

1 IN THE UNITED STATES DISTRICT COURT

2 IN AND FOR THE DISTRICT OF DELAWARE

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4 ATELIERS DE LA HAUTE-GARONNE (French : CIVIL ACTION  
Corporation) and F2C2 SYSTEMS S.A.S. :  
5 (French Corporation), :

6 Plaintiffs, :

7 v. :

8 BROETJE AUTOMATION-USA INC. (Delaware :  
Corporation), BROETJE AUTOMATION GMBH :  
9 (German Corporation), :

: NO. 09-598-LPS

10 Defendants.

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12 Wilmington, Delaware  
Tuesday, April 8, 2014  
13 *Jury Trial - Volume B*

14 - - -

15 BEFORE: HONORABLE **LEONARD P. STARK**, U.S.D.C.J., and a jury

16 APPEARANCES:

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17 YOUNG CONAWAY STARGATT & TAYLOR, LLP  
18 BY: MELANIE K. SHARP, ESQ., and  
JAMES L. HIGGINS, ESQ.

19 and

20 KAYE SCHOLER, LLP  
21 BY: SCOTT G. LINDVALL, ESQ., and  
JEFFREY H. HOROWITZ, ESQ.  
(New York, New York)

22 and

23  
24 Valerie J. Gunning  
25 Official Court Reporter

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Official Court Reporter

1 APPEARANCES: (Continued)

2  
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13 DRINKER BIDDLE & REATH, LLP  
14 BY: PATRICK J. KELLEHER, ESQ.,  
DARREN S. CAHR, ESQ., and  
15 CARRIE A. BEYER, ESQ.  
(Chicago, Illinois)

16 Counsel for Broetje Automation-USA Inc.  
17 and Broetje Automation GmbH

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23 P R O C E E D I N G S

24 (REPORTER'S NOTE: Jury trial proceedings were  
25 held in open court, beginning at 8:30 a.m.)

1 THE COURT: Good morning, everyone.

2 (The attorneys respond, "Good morning, Your  
3 Honor.")

4 THE COURT: I understand some issues. First,  
5 anything from plaintiffs?

6 MR. HOROWITZ: Yes, Your Honor.

7 Per the pretrial order, defendants gave us  
8 notice that they're going to call their first witness  
9 perhaps today. And they gave us a list of exhibits, and  
10 it's Mr. Ken Benczkowski from Broetje USA. He is actually  
11 seated I believe as the corporate representative. And this  
12 is the very issue that I raised with you at the pretrial  
13 conference because I had a sense this was coming.

14 They put on their list, and it's not a long  
15 list, several exhibits where Mr. Benczkowski has absolutely  
16 zero personal knowledge, so I am moving under Federal Rule  
17 of Evidence 602 to preclude the use of these documents by  
18 Mr. Benczkowski because there is no foundation.

19 THE COURT: Were they objected to in the  
20 pretrial order?

21 MR. HOROWITZ: Yes, they were.

22 THE COURT: Upon what basis were they objected  
23 to?

24 MR. HOROWITZ: Including 602.

25 THE COURT: All right. Do you have any other

1 bases to object to them today?

2 MR. HOROWITZ: That's my primary basis. And  
3 would you like to hear the reasons for that?

4 THE COURT: To prove that he does not have  
5 personal knowledge?

6 MR. HOROWITZ: Yes.

7 THE COURT: Sure. Remind me, though, did I make  
8 a decision at the pretrial conference on this?

9 MR. HOROWITZ: You said to raise this with you  
10 at this time as opposed to at the time of the witness.

11 THE COURT: Thank you for doing that. Okay.  
12 Yes, tell me. I mean ordinarily -- well, not ordinarily.  
13 Sometimes we don't necessarily require the personal  
14 knowledge if someone else is going to have it. But to the  
15 extent you understand what they intend to do with the  
16 exhibit and you want to press your objection, tell me why I  
17 shouldn't allow it.

18 MR. HOROWITZ: Yes, I would like to press it  
19 because Mr. Benczkowski didn't come to Broetje, and it was  
20 Broetje USA in 2008. These are documents from Broetje  
21 Germany in 2004, 2005, 2006. Mr. Benczkowski has testified  
22 at his deposition that he neither reads, nor writes, nor  
23 speaks German. These documents are mostly written or  
24 contain an awful lot of German. He has absolutely no  
25 percipient knowledge of these documents. He can't. In

1 fact, Broetje USA didn't even begin to exist until 2006.

2 There is also, in a separate category, an  
3 e-mail, and I do believe this is a separate category, in  
4 2009 that he is not cc'd on, and I don't think -- I have to  
5 go back and look. I apologize. I'm not sure any of their  
6 witnesses are cc'd on it that they intend to call. So these  
7 are classic documents where there just is no foundation.

8 THE COURT: All right. Let me hear from Broetje  
9 on this. Thank you.

10 MR. KELLEHER: Good morning, Your Honor.

11 THE COURT: Good morning.

12 MR. KELLEHER: Looking at the exhibit list, I  
13 see that many of these exhibits they're objecting to now do  
14 not have any objections from AHG in their column.

15 But aside and apart from that, what these  
16 documents are, are the business records of the companies.  
17 Mr. Benczkowski is the President of Broetje USA, and he  
18 ultimately is the main custodian of all the documents of the  
19 companies. We know those two companies work together.

20 What these kind of documents are, Your Honor,  
21 are, among others, the shipping documents showing that we  
22 tell the customers that the cassettes are manufactured by  
23 Broetje Automation in Europe. There is German on them. For  
24 instance, they say cassettes. Directly underneath them,  
25 they say the translation which is the translation since

1       these are sent to customers in the United States.

2               Other things are like communications with  
3       customers which are business records. The other things are  
4       financial information and sales information pulled from the  
5       database which is a compilation of business record  
6       information. So I think he is a proper witness to get these  
7       things in as our business records.

8               THE COURT: So the business records would be an  
9       exception to any hearsay objection. But we don't seem to  
10      have a hearsay objection.

11              MR. KELLEHER: Right.

12              THE COURT: Your response to the lack of  
13      personal knowledge is?

14              MR. KELLEHER: He has a personal knowledge of  
15      what the records of the companies look like because he is  
16      the President of Broetje USA.

17              THE COURT: And you will lay a foundation he has  
18      personal knowledge of the records of the business not just  
19      at the USA level but also at the German level?

20              MR. KELLEHER: The companies work together, and  
21      they have access to each other's records.

22              THE COURT: All right. So that is the first  
23      category of documents, I take it.

24              MR. KELLEHER: Yes, Your Honor.

25              THE COURT: And the e-mail, are you familiar

1 with the e-mail of 2009?

2 MR. KELLEHER: Yes, Your Honor. That is a  
3 reverence to communications from customers to Laura Ballard,  
4 who is the spare parts engineer at Broetje USA. And they  
5 were inquiring about purchasing F2C2 spare parts. And she  
6 responded we have no more dealing with F2C2. Here is their  
7 contact information. So these kind of communications which  
8 are made in the ordinary course of business and are kept and  
9 are made by a person with knowledge. They would be business  
10 records.

11 THE COURT: Tell me again the woman's name and  
12 what is her position?

13 MR. KELLEHER: Laura Ballard. B-a-l-l-a-r-d.  
14 And she is a spare parts engineer, so she --

15 THE COURT: At Broetje USA?

16 MR. KELLEHER: At Broetje USA.

17 THE COURT: Does she report to Mr. Benczkowski?

18 MR. KELLEHER: Directly.

19 THE COURT: All right. Is there anything else?

20 MR. KELLEHER: I think I addressed everything,  
21 Your Honor.

22 THE COURT: Okay. Mr. Horowitz, did you want to  
23 respond?

24 MR. HOROWITZ: Your Honor, just to clarify. I  
25 did misspeak. The 602 objections are not on the -- of

1 course, it would be pursuant to who they are going to call.  
2 That is why I raised it with you at the pretrial conference.

3 THE COURT: Are there any objections?

4 MR. HOROWITZ: Yes. For example, the Ballard  
5 document, there is a hearsay objection. And my response is  
6 if you follow the logic of their argument, all of this comes  
7 regardless of who they use it with and how they use it, that  
8 can't be.

9 THE COURT: What about the point that it comes  
10 in through a witness who has personal knowledge as to how  
11 the business records are kept at the company?

12 MR. HOROWITZ: If they have personal knowledge  
13 of how the business records are kept, they may be able to  
14 establish the elements, but they still can't -- I mean I'm  
15 not sure how Mr. Benczkowski can testify as to the business  
16 records were kept at Broetje Germany in 2004, 2005 and 2006  
17 when he is President of Broetje USA in 2008. He doesn't  
18 have that knowledge.

19 THE COURT: Well, it may be saying how they are  
20 kept is too narrow on my part. If he is going to testify in  
21 substance, I work at Broetje USA, I interact as part of my  
22 job with Broetje Germany, and these are the types of  
23 documents that I see regularly and rely on as part of that  
24 capacity, isn't that adequate personal knowledge for the  
25 documents to come in?



1                   MR. HOROWITZ: If he can say that he reviews and  
2                   relies upon them, I guess. I question how he can do that  
3                   about 2004, 2005 documents written in Germany four or five  
4                   years before he began at the company, but I don't disagree  
5                   with your premise.

6                   THE COURT: Okay. And what about the e-mail?

7                   MR. HOROWITZ: The e-mail, that is, again that  
8                   is classic hearsay. He is not on the e-mail. I mean if you  
9                   follow that logic, that any witness at a company can testify  
10                  about any e-mail, that it would come in regardless of who is  
11                  testifying, and that doesn't make any sense. It would have  
12                  to be somebody that had personal knowledge of that e-mail  
13                  and was on the e-mail because the substance of that e-mail  
14                  is going to come in once that document comes in.

15                 THE COURT: All right. I'm going to overrule  
16                  these objections. I'm satisfied that to the extent there  
17                  are hearsay objections that a foundation will be laid that  
18                  these are business records kept in the ordinary course of  
19                  business and the type of documents that are seen by and  
20                  relied on by the personal at Broetje USA as well as Broetje  
21                  Germany. I'm satisfied at least based on the representations  
22                  that there a foundation laid and Mr. Benczkowski is a proper  
23                  witness who has adequate knowledge from his professional  
24                  capacity as to how these documents are used at the company,  
25                  including Broetje USA. I'm satisfied that he will likely

1     testify that is truly going to with respect to somewhat  
2     historical documents that were created before he got there  
3     but remain in the custody and control of the company.

4             With respect to the e-mail, the representation  
5     is that it was written by or at least copied to an  
6     individual who reports to him and is kept in the ordinary  
7     course of business. And I think that satisfies enough at  
8     least the objections on hearsay and lack of personal  
9     knowledge. So we'll let those documents be used.

10            Are there other issues from plaintiffs?

11            MR. HOROWITZ: No, Your Honor.

12            THE COURT: Okay. Are there any issues from  
13     defendants?

14            MR. CAHR: Yes, Your Honor.

15            THE COURT: Okay.

16            MR. CAHR: I will handle a couple of them.

17            THE COURT: Okay.

18            MR. CAHR: Mr. Kelleher will handle one or two  
19     as well.

20            First, one of the witnesses who will be called  
21     today is Dominique Hage. And Dominique Hage is going to put  
22     in some documents relating directly to the French judgment.  
23     We just want to maintain our objections. We understand you  
24     have already ruled on them. So that is just a matter of  
25     just maintaining and preserving our objection.

1 THE COURT: Okay. The objection is noted then.

2 MR. CAHR: Thank you very much, Your Honor.

3 Another witness who will be up is Douglas Ellis  
4 who is the damages expert. And, Mr. Ellis, there will two  
5 separate sets of issues, and the easier one I'll deal with  
6 first which is the exhibits that he plans on using.

7 One of the exhibits he intends on using is  
8 marked JTX-32. This is an internal spreadsheet generated in  
9 connection with the internal information of F2C2 and/or AHG.  
10 It is not something that he has. We're talking about  
11 personal knowledge. This is something which is a summary of  
12 information that he did not summarize. Somebody else did.  
13 This was created internally. We don't have the documents,  
14 all of the information that this witness used to create.

15 It is thus objectionable as hearsay under 105,  
16 901, 1006, 705. We noted all of these objections prior.  
17 It's just outside the scope of what can be introduced by  
18 him.

19 Now, that said, if somebody else within the  
20 company brings that in, we certainly have no objection to  
21 him testifying. It's a document he relied on as an expert.  
22 He is certainly allowed to talk about it. He is certainly  
23 allowed to perhaps even use it as a demonstrative. But he  
24 is not allowed to be the percipient witness who brings it  
25 into evidence.

1 JTX-58 is a similar situation. He certainly  
2 is able to talk about it. It's something he relied on.

3 THE COURT: Another spreadsheet.

4 MR. CAHR: Another spreadsheet. It's not a  
5 document which he has any personal knowledge of. He didn't  
6 do the summary. Again, if someone else brings it into  
7 evidence, he can certainly talk about it, but he is not a  
8 proper party to bring that into evidence.

9 The Exhibit 595 is an annual report from CLAAS,  
10 the participant company, during the relevant period of  
11 Broetje. Obviously, this is something that could be brought  
12 in through some other witness, perhaps one of ours, but it  
13 is not something which has -- he has no personal knowledge.  
14 You know, whether he printed it off the Internet or did  
15 what, I just have no idea, but entering it into evidence  
16 through the damages expert is just inappropriate.

17 THE COURT: It's publicly available?

18 MR. CAHR: It is publicly available.

19 THE COURT: It's filed with some government  
20 agency?

21 MR. CAHR: You know --

22 MR. KELLEHER: I don't know for a fact, Your  
23 Honor. CLAAS is a family owned company. I'm not sure it's  
24 publicly held.

25 THE COURT: It's certainly not filed with the

1 SEC here in the U.S.?

2 MR. CAHR: No, it is not. They're a German  
3 entity. To be perfectly frank, I don't know the exact  
4 details of its larger availability, but certainly it's  
5 something that he can talk about having relied on. He's a  
6 damages expert. He can talk about that all he wants, but  
7 entering it into evidence through him, the damages expert,  
8 just does not work.

9 Then there is a larger issue which the parties  
10 have actually mostly agreed on, but not completely.  
11 Obviously, there are hearsay issues and different Courts  
12 have addressed differently the question of whether or not an  
13 expert report itself can or should be entered into the  
14 record as evidence, and certainly with a damages expert  
15 report, doubly. The parties agreed that as a half step, as  
16 something which both parties would feel very comfortable  
17 with, we can take out the CVs from the, from the expert  
18 reports and utilize the CVs as newly created exhibits that  
19 both sides can use for all four of the experts, and that we  
20 agreed that the expert reports themselves are not  
21 admissible.

22 However, they do want, AHG does want to be able  
23 to offer select, select attachments from the expert report  
24 as exhibits. And, again, this goes to what we were talking  
25 about before. It's obviously hearsay. It's obviously based

1 on all sorts of other things. He can certainly talk about  
2 it. He can use it as a demonstrative. And certainly, if  
3 they can bring those documents in through some other  
4 witness, although in this particular case, unlike the other  
5 ones, I don't know that they could, then he can testify  
6 about it. But I think the general principle of them being  
7 excluded is hearsay is very much applicable here.

8 THE COURT: Are these things like certain  
9 calculations and analyses that he has done?

10 MR. CAHR: Correct. It's all of those things.  
11 And, again, we have no objection to either side sitting here  
12 with a projector, sticking the, sticking the expert report  
13 under the projector. And, in fact, one thing we want to  
14 ask you about is how we mark those for your preference. But  
15 the -- and putting them under there and showing this  
16 particular number and saying, well, explain this. But it's  
17 not evidence. It's not something that should be provided as  
18 such. And it seems to sort of defeat the whole notion of  
19 how we define the difference between the damages expert and  
20 the evidentiary value of the things that they are relying  
21 on.

22 THE COURT: Okay,

23 MR. CAHR: We have one other -- -- I have  
24 another issue involving Ellis involving a demonstrative. If  
25 you would like, these are a little long. We can break it

1 up.

2 THE COURT: Yes.

3 MR. CAHR: This probably makes more sense.

4 THE COURT: Let's figure out which one of these  
5 are the easy ones.

6 MS. SHARP: Good morning, Your Honor. On the  
7 issue of the attachments to the expert report, we didn't  
8 agree to newly created exhibits. We did agree that the CVs  
9 go in, so the remaining issue is the attachments. The  
10 attachments --

11 THE COURT: First of all, your agreement that  
12 CVs go in is fine, so you can all put the CVs in. How  
13 about, did you agree that the reports as a whole are not  
14 admissible? Is that agreed?

15 MS. SHARP: We did agree that the reports as a  
16 whole are not.

17 THE COURT: I'm fine with both of those. The  
18 attachments, though?

19 MS. SHARP: So the final issue is the attachment  
20 that reflects the calculations. The attachments are  
21 compilations of underlying data that have been verified.  
22 The attachments are obviously information debts. There's  
23 an enormous information of information in them. They  
24 certainly can be shown. They would be put on the screen.  
25 They are difficult to read because they are numbered

1       calculations.

2               So my understanding was we had an open question  
3       because each side would probably, for its damages expert,  
4       or, yes, for its damages expert want to put in those  
5       attachments so that the jury could refer back to them.

6               So is --

7               THE COURT: I think the open question is they  
8       don't want to do it. Is that correct?

9               MR. CAHR: Your Honor, we're more than happy to  
10       use them as demonstratives and have them blown up even so  
11       that everyone can see it. But having them as evidence I  
12       think just gives them -- well, promotes that, really.

13              THE COURT: You are not trying to do something  
14       that you are depriving them of. You don't want to put your  
15       calculations in?

16              MR. CAHR: We're fine with nobody's coming in  
17       and just having the ability just to, you know, stick them  
18       under the projector and talk about it.

19              THE COURT: So the proposal is they would just  
20       be demonstratives, use them as proper demonstratives, but  
21       they won't be admitted into evidence, so they won't go back  
22       to the jury room. Does the plaintiff agree to that?

23              MS. SHARP: We don't agree to the proposal  
24       because we think that that would be difficult and  
25       cumbersome, particularly in a timed trial, and that these



1 documents would meet the hearsay objection because they are  
2 compilations and additions of the verified underlying data.

3 THE COURT: All right.

4 MS. SHARP: And it would simply make the issue  
5 much clearer for the jury if the jury chooses to refer back  
6 to the calculations.

7 THE COURT: All right. Well, I guess go  
8 backwards to the exhibits objection, because I don't know if  
9 I understood that the documents underlying even the  
10 calculations that we just talked about are verified as going  
11 to be admitted. So I take it that you say that they are, at  
12 least for yours, but what about these exhibits that we began  
13 with?

14 MS. SHARP: For Exhibits 32 and 58, I understand  
15 defendants to agree that Mr. Ellis can testify about the  
16 content of the exhibits, and I think we'd be satisfied to  
17 put them in through another witness.

18 THE COURT: Okay. Fine. Then they won't be  
19 admitted through Mr. Ellis.

20 MS. SHARP: The annual report is the publicly  
21 available document on the Internet. I don't know the answer  
22 to whether it's filed with a public agency, Your Honor. As  
23 I stand here, I don't know that answer, but certainly  
24 Mr. Ellis is entitled to rely on the hearsay in that  
25 document. We believe that will go in through a Broetje

1 witness.

2 THE COURT: Is it any prejudice to you for him,  
3 Mr. Ellis, just to testify about it, use it as a  
4 demonstrative, but not admit it into evidence through him?

5 MS. SHARP: As long as the defendant doesn't  
6 then get up and say, you never saw any document and imply  
7 that the jury will never see any document and thereby  
8 undermine the witness' testimony as being only verbal  
9 and not based on a document, then there would be no  
10 prejudice.

11 THE COURT: Well, I was -- I think there's no  
12 objection to him testifying about the annual report, saying  
13 the annual report exists, and there may not even be an  
14 objection to you calling it a demonstrative exhibit and  
15 showing it to the jury.

16 Did I understand that correctly?

17 MR. CAHR: If, Your Honor, if he wants to show  
18 it to the jury and, you know, stick it under the projector  
19 and show it, I don't think that under the circumstances as a  
20 damages expert, we would have any objection.

21 THE COURT: All right.

22 MS. SHARP: We're fine with that, then, Your  
23 Honor.

24 THE COURT: So it just won't come into evidence  
25 unless you move it through some other witness, but you won't

1 move it through Mr. Ellis.

2 MS. SHARP: Understood.

3 THE COURT: All right. Thank you.

4 Then I think the only dispute remains, what  
5 about the summary attachments to both experts' calculations  
6 and so I have the question to Broetje, is it -- do you have  
7 any reason to dispute the representation of Ms. Sharp that  
8 all of the underlying documents that are summarized and  
9 utilized, I guess, in the calculation are coming into  
10 evidence anyway?

11 MR. CAHR: Your Honor, I don't know that, and  
12 these are being offered effectively for the truth of the  
13 matter asserted, that these are the actual numbers that are,  
14 that should be relied on. When we're talking about a  
15 damages expert, the whole principle is that he's relying on  
16 information that you have brought into evidence through  
17 someone who actually has percipient knowledge of that, of  
18 that information.

19 And basically what's happening here is a whole  
20 step is being skipped and he is the one bringing into  
21 evidence documents that he did not summarize, that he was  
22 not involved in producing. And it's certainly something is  
23 that he relied on. It is completely within the scope of  
24 what a damages expert can do to talk about the things he  
25 relied on. You know, hey, I was referred to this summary

1 chart which said this, this, this and this. But to actually  
2 get it into evidence, you need to have an evidentiary basis  
3 to do so.

4 And as you know, I mean, there's magic to the  
5 principle that the financial document is actually presented  
6 as evidence, and I just don't think that as a damages  
7 expert, he's in any position to do that. That is not to say  
8 that there is not some, not some other witness who could get  
9 that in, and if some other witness gets it in, you know,  
10 we're fine with him being questioned about it as an exhibit,  
11 but it just can't get in through him.

12 THE COURT: All right. Ms. Sharp, I may have  
13 misunderstood the representation. I think the  
14 representation was these are, these documents are coming in  
15 through somebody because they've all been vetted as  
16 underlying data for the company. Is that correct?

17 MS. SHARP: Not in every single instance, not  
18 every single of the 15,000 underlying documents that the  
19 calculations were based on is coming in independently.  
20 That's one of the reasons that the summary is necessary.

21 In terms of the risk that Mr. Cahr has  
22 identified, it's going to be clear to the jury that these  
23 are summary calculations and Mr. Ellis will explain them.  
24 These are summaries of underlying data. He identifies on  
25 the summaries the underlying source.

1 THE COURT: Why not, to make a complete  
2 record, why not move the 15,000 pages in through a proper  
3 witness?

4 MS. SHARP: With the sponsorship requirement in  
5 a timed trial, that may be nearly impossible.

6 MR. CAHR: We would even be willing, if their  
7 witness has knowledge, if they want to move those 15,000  
8 documents in and it's someone who created the sales summary  
9 and can testify with knowledge about that, that's fine. But  
10 what we're talking about here is a situation where I have  
11 not seen in the witness -- I mean, their case-in-chief is  
12 going to end today, and so we know what all of the exhibits  
13 are that are going to be presented with all of the witnesses  
14 in their case-in-chief. None of them have anything which  
15 would support any of the things in this, in these  
16 compilations.

17 You know, there's no -- there's no, you know,  
18 nothing there saying, well, this example, this example and  
19 this example is how we create this compilation, and I am  
20 someone who is involved in the financial management of the  
21 company, so I understand how that is kept in the normal  
22 course of business, so this particular spreadsheet which ran  
23 through this particular method is an accurate reflection.  
24 That would be fine. But there's no -- we've seen what all  
25 the exhibits are that are going to be entered into their

1 case-in-chief and none of them do that.

2 THE COURT: Ms. Sharp, do you want to have the  
3 last word?

4 MS. SHARP: I'm told that we can put all of the  
5 underlying documents in through Mr. Hage, but we would  
6 probably need to do it en masse because of the sheer  
7 quantity.

8 THE COURT: Right.

9 MS. SHARP: And all of those underlying  
10 documents obviously were not on the list of exhibits we said  
11 we would use with him.

12 THE COURT: Is there an objection to that  
13 approach?

14 MR. CAHR: If all 15,000 of them were produced  
15 to us and we had a chance to review them, that's fine.

16 THE COURT: Well, we don't have much time.

17 MR. CAHR: No, but that's what I'm saying. I  
18 mean, that's why it is just improper, an improper thing to  
19 put in.

20 THE COURT: Ms. Sharp, have they been produced?

21 MS. SHARP: They have been produced. They were  
22 part of the exchange identified in the expert reports and  
23 available for and subject to examination at Mr. Ellis'  
24 deposition examination, the same documents that were  
25 provided to defendants' expert.

1 THE COURT: Mr. Cahr, do you have any reason to  
2 doubt that?

3 MR. CAHR: You know what, if they are all  
4 documents that have been provided to us and once we see  
5 them, we agree, then that's fine. You know, if --

6 THE COURT: Well, I'm not sure by what you mean  
7 once you see them.

8 MR. CAHR: I can't honestly represent that  
9 15,000 of documents were produced to me when I don't  
10 remember or know offhand. Obviously, a lot of those things  
11 took place three years ago, too. But I mean, certainly, if  
12 they are willing to move in, to move in documents with a  
13 proper foundation and they are able to move in those  
14 documents with a proper foundation with someone who can say  
15 these documents connect up to this summary in this  
16 particular fashion and they're documents that have been  
17 properly disclosed to us, that's normal trial practice.  
18 That's fine.

19 THE COURT: Ms. Sharp?

20 MS. SHARP: Your Honor, it sounds as if the  
21 resolution would be to request permission to recall Mr. Hage  
22 so that Mr. Cahr could look at the underlying documents and  
23 we could do this in a short period of time as possible. It  
24 does not seem like we're going to be able to get it done  
25 today.

1 THE COURT: Okay. Well, if that's what the  
2 plaintiff is proposing, is that acceptable to defendant?

3 MR. CAHR: So the idea would be, it would be  
4 Mr. Hage's normal testimony today, but just that one issue  
5 would remain outstanding until we were able to --

6 THE COURT: Presumably re-call him tomorrow  
7 after you've had a chance to confirm the representations  
8 made that these documents were all produced to you and you  
9 had an opportunity to look at them.

10 MR. CAHR: Well, here's what I would suggest.  
11 It would be useful if the foundation were actually laid for  
12 them today in the, in the testimony so that we would have a  
13 sense of whether or not -- basically, so we would understand  
14 the whole framework for the documents. Then we can take a  
15 look at them and then it may not even be necessary to recall  
16 him. We may be able to agree without even having to call  
17 him again.

18 THE COURT: Ms. Sharp, do you want to proceed  
19 that way?

20 MS. SHARP: I'm not sure I do understand what  
21 you are saying. That we would do a foundation?

22 THE COURT: I will give you a chance to confer  
23 on it. We have Mr. Bornes first. And then when is Mr. Hage  
24 getting on?

25 MR. CAHR: Right thereafter.



1 MR. HOROWITZ: I believe direct -- either  
2 directly after our video, short video, and then in short  
3 order after Mr. Bornes.

4 THE COURT: Okay. We're going to take at least  
5 a short break for me to step out and then make sure the jury  
6 is here. So I will have you confer during that time frame.  
7 But were there other issues related to Mr. Hage that we have  
8 to deal with?

9 MR. CAHR: Not related to Mr. Hage.

10 THE COURT: Mr. Ellis?

11 MR. CAHR: There's one more thing about  
12 Mr. Ellis and then one more thing about Mr. --

13 THE COURT: And Ellis and Kytomaa are after  
14 Bornes and Hage?

15 MR. CAHR: Yes.

16 THE COURT: All right. We'll have a chance to  
17 deal with those issues. If I have to, I will take another  
18 break, but we'll get through Bornes and Hage.

19 So first I'm going to take a short break. You  
20 all figure out if you can work out the Hage issue. If you  
21 can't, when I come back, I will give you a ruling on that  
22 and then we'll bring the jury in.

23 Whatever we do as demonstratives, you should  
24 just, you know, if you are making marks on it or whatever,  
25 mark it as a new demonstrative, give it a demonstrative

1       number and that will identify it for the record.

2               MR. CAHR: That's great, your Honor. And there  
3       are -- the remaining issues for Ellis are his demonstrative  
4       and the remaining issues for Kytomaa are the demonstrative.  
5       They are not being called right this second. We can talk  
6       about those at the next break.

7               THE COURT: We'll deal with those eventually.

8               MR. CAHR: All right.

9               THE COURT: All right. We're in recess.

10              (Brief recess taken.)

11              \*       \*       \*

12              (Proceedings reconvened after recess.)

13              THE COURT: The jury is here and we want to  
14       bring them in. Have you made any progress on the issue we  
15       were discussing?

16              MR. CAHR: We have. We're not quite done but we  
17       actually have made progress.

18              THE COURT: Do you agree with that?

19              MS. SHARP: Yes.

20              THE COURT: I guess before we call the witness,  
21       if there remains a dispute, let's have a sidebar and we'll  
22       sort that out.

23              MR. CAHR: That probably makes the most sense.

24              THE COURT: All right. We'll bring the jury  
25       back in.

1 MR. HOROWITZ: Your Honor, before the jury comes  
2 in, maybe I can do one quick housekeeping matter.

3 THE COURT: Yes.

4 MR. HOROWITZ: I apologize. I just, in your  
5 binder and your clerk's binder and I thought everybody  
6 else's, in light of your ruling yesterday during opening  
7 statements, we now have an unredacted PTX-546.

8 THE COURT: Okay. You can pass that up.

9 (Document passed forward.)

10 THE COURT: Any objection to that?

11 MR. KELLEHER: That matches your ruling.

12 THE COURT: Right. Okay. Thank you. You can  
13 bring the jury in.

14 (Jury returned.)

15 THE COURT: Good morning, ladies and gentlemen  
16 of the jury.

17 THE JURORS: Good morning.

18 THE COURT: We are prepared to proceed. We'll  
19 have Mr. Bornes come back to the stand, please, along with  
20 our translator assistant.

21 ... PHILLIPPE BORNES, having been previously  
22 sworn, was examined and testified further as follows ....

23 THE COURT: Good morning to both of you.  
24 Mr. Bornes, I remind you that you remain under oath.

25 THE WITNESS: Yes.

Bornes - direct

1 THE COURT: You may proceed when you are ready.

2 MR. HOROWITZ: Thank you, Your Honor.

3 DIRECT EXAMINATION (Continued)

4 BY MR. HOROWITZ:

5 Q. Good morning, Mr. Bornes.

6 A. Good morning.

7 Q. Yesterday, you told us yesterday afternoon that you  
8 were the general manager of F2C2 from 2001 to 2007?

9 A. Yes.

10 Q. And when you transitioned from AHG to F2C2, did your  
11 work on the rivet distribution system that you were doing  
12 change in any way?

13 A. No.

14 Q. As the parent company of F2C2, what role, if any, did  
15 AHG continue to play or play in the day-to-day operations of  
16 F2C2?

17 A. F2C2 is a small company. So we didn't have men to do  
18 everything which is needed to be done in the company. And  
19 AHG has all the departments inside. So we decided that the  
20 department like accountancy were being done for F2C2 by AHG.

21 Q. When you say accountancy, do you mean accounting to  
22 keep the books?

23 A. Yes.

24 Q. And that was done by AHG?

25 A. Yes.

Bornes - direct

1 Q. For F2C2?

2 A. Yes.

3 Q. In 2001, when you and Jean-Marc Auriol created F2C2,  
4 did you put any agreements in place, any written agreements  
5 about the relationship between AHG and F2C2?

6 A. Yes.

7 Q. If you could turn in your binder in front of you?

8 Yes. Please turn to PTX-610. 610.

9 A. (Witness complies.)

10 Q. What is PTX-610?

11 A. So this is an agreement between Jean-Marc Auriol,  
12 Anthony Dal Garron, me, and F2C2 System.

13 Q. And who signed this agreement?

14 A. So it is signed by Jean-Marc Auriol for him and on  
15 behalf of Ateliers De La Haute-Garonne, and also for me on  
16 behalf of F2C2 System.

17 Q. So you and Jean-Marc signed it on behalf of F2C2 and  
18 AHG and yourself?

19 A. Yes.

20 Q. Okay. And what year was it signed?

21 A. It was in 2001.

22 Q. What was the purpose of this agreement, PTX-610?

23 A. It was to give an exclusive license to F2C2 to use  
24 all patent which are dealing with the cassette system.

25 Q. What was the financial arrangement agreed upon

Bornes - direct

1 between F2C2 and AHG with respect to this exclusive license?

2 A. F2C2 was to give 15 percent on all sales to AHG.

3 Q. 15 percent?

4 A. Yes.

5 Q. What patents, which patents did you understand to be  
6 covered by this agreement?

7 A. All the patents worldwide, including U.S. patents.

8 Q. Would that include the '216 and '339 patents?

9 A. Yes, the ones we saw yesterday.

10 Q. And under this agreement, could AHG license the rivet  
11 distribution system technology --

12 A. No.

13 Q. Let me finish. (Continuing): -- to anyone other than  
14 F2C2?

15 A. No.

16 Q. Did AHG ever license the patents to anyone other than  
17 F2C2?

18 A. No.

19 Q. If you could turn in your binder to JTX-38 and  
20 JTX-38T?

21 A. Yes.

22 Q. Could you identify and tell us what JTX-38 and  
23 JTX-38T are?

24 A. It's also an agreement between Jean-Marc Auriol, AHG,  
25 me, and F2C2 System.

Bornes - direct

1 Q. And what year was this agreement?

2 A. It was in 2008.

3 Q. And what kind of agreement was it?

4 A. It's also exclusive license to use all the patents  
5 for the cassette system.

6 MR. HOROWITZ: Your Honor, at this time I would  
7 offer PTX-610, JTX-38, and JTX-38T in evidence.

8 MR. KELLEHER: No objection.

9 THE COURT: They are all admitted.

10 (PTX-610, JTX-38, and JTX-38T are admitted into  
11 evidence.)

12 BY MR. HOROWITZ:

13 Q. Mr. Bornes, I want to switch gears with you a little  
14 bit. Okay?

15 A. Yes.

16 Q. I want to talk to you about the relationship between  
17 your companies, AHG and F2C2, and the defendant Broetje.

18 A. Yes.

19 Q. When was AHG's first contact with this company  
20 Broetje?

21 A. It was in 1991.

22 Q. And who is Broetje?

23 A. Broetje is a big company in Germany which is  
24 manufacturing a rivet -- automatic riveting machine.

25 Q. Automatic riveting machines?

Bornes - direct

1 A. Yes.

2 Q. How did this first contact between AHG and Broetje  
3 come back?

4 A. It was about to sell to British Aerospace in England.  
5 It want to make new automatic riveting system, so they  
6 asked Broetje to make the riveter and they want to put our  
7 cassette system.

8 Q. To use your cassette system?

9 A. Yes.

10 Q. With the Broetje riveting machine?

11 A. Yes.

12 Q. Did you personally work on this project in 1991  
13 involving Broetje, AHG, and BAE?

14 A. Yes.

15 Q. If you could turn in your binder to PTX-107, please.

16 A. Yes.

17 Q. And could you identify for us what PTX-107 is?

18 A. Yes. It is a the letter written by Corin Warner who  
19 was our representative in England to Mr. Gerhard Holtmeier  
20 from Broetje. It was in August 2001 -- 1991. Excuse me.

21 Q. 1991. And what is on the second page of PTX-107?

22 A. So this is a memo sent by Mr. Corin according to AHG  
23 speaking about a meeting which has been done there with  
24 Broetje, BAE, and him.

25 Q. In 1991, did you receive a copy of this letter and



Bornes - direct

1 this memo?

2 A. Yes.

3 Q. And how do you know that?

4 A. Because if you look to 18, on it is written PB, that  
5 is my initials.

6 Q. That is your initials?

7 A. Yes.

8 MR. HOROWITZ: Your Honor, I would offer PTX-107  
9 into evidence.

10 MR. KELLEHER: No objection.

11 THE COURT: It is admitted.

12 (PTX-107 is admitted into evidence.)

13 BY MR. HOROWITZ:

14 Q. Turning back to the letter briefly, PTX-107.1. Are  
15 you referenced in this letter?

16 A. Yes, it is written that I am the technical manager  
17 for this project.

18 Q. And if you turn to PTX-107.2, what was reported in  
19 the first few paragraphs in this memo at that time about the  
20 project you were involved in?

21 A. So it was written that BAE Preston will be buying the  
22 riveting machine from this German company.

23 Originally, Broetje were going to supply the  
24 rivet feed system, but Mr. Greg Thompson at BAE said he  
25 wants the AHG system.

Bornes - direct

1 Q. Okay. And what is recorded in the next paragraph?

2 A. It says that: As you can see from my letter to him,  
3 I have sent details -- explaining that this is a proprietary  
4 item -- and suggesting they contact you directly.

5 Q. And Gerhard Holtmeier would like to see the system to  
6 understand how it works. Who was Gerhard Holtmeier?

7 A. It was the general manager from Broetje.

8 Q. The general manager?

9 A. Yes.

10 Q. And in the paragraph below you just read to the  
11 jury, how did you or how was the system, AHG's system  
12 characterized to Broetje in 1991 in this very first  
13 transaction?

14 A. It was proprietary.

15 Q. Proprietary item?

16 A. Yes.

17 Q. If you could turn to PTX-358 and 358T in your binder,  
18 please?

19 A. (Witness complies.)

20 Q. When you get there, could you identify PTX-358 and  
21 358T for us, please?

22 A. Yes. It is the fax has been sent to Mr. Holtmeier in  
23 April 1994.

24 Q. And what is contained with the fax?

25 A. So it's containing the agreement we have signed with

Bornes - direct

1 Broetje in 1994.

2 Q. And did you understand this to be a contract?

3 A. Yes.

4 MR. HOROWITZ: Your Honor, I would offer in  
5 PTX-358 and PTX-358T in evidence.

6 MR. KELLEHER: No objection.

7 THE COURT: They're admitted.

8 (PTX-358, PTX-358T admitted into evidence.)

9 BY MR. HOROWITZ:

10 Q. Please turn to PTX-358T.12 and the contract in 1994  
11 between AHG and Broetje. Do you see that?

12 Let me know when you are there.

13 A. Yes.

14 Q. What is set forth in the second part? It says in the  
15 second part with regard to the general purpose of the  
16 contract?

17 A. Well, it says that Broetje Company makes automatic  
18 riveting machines. AHG has developed, makes and sells a  
19 rivet feed tube system for automatic riveting machines,  
20 which is the subject of patent protection, and which system  
21 allows to feed selected rivets.

22 Q. So how does this contract characterize AHG's rivet  
23 distribution system?

24 A. That's the subject of patent.

25 Q. It's the subject of patent protection?

Bornes - direct

1 A. Yes.

2 Q. Going to the top of the next page, 358T.13, what does  
3 the contract say with respect to Broetje and its general  
4 provisions here?

5 A. It says that Broetje has expressed its interest in  
6 this new tube feed system and has contracted AHG with a view  
7 to being allowed by the latter to sell in Germany, in an  
8 exclusive manner, that new system made by AHG.

9 Q. So it says Germany in an exclusive manner. What did  
10 you understand that to mean?

11 A. That means that Broetje has -- only was right to sell  
12 our system in Germany.

13 Q. And who did Broetje buy the system from to sell in  
14 Germany?

15 A. Buying from us.

16 Q. From AHG and then --

17 A. Or F2C2. At that time, only AHG.

18 Q. Okay. Did this agreement limit at all who AHG or  
19 F2C2 could sell its cassette system to outside of Germany?

20 A. No.

21 Q. Okay. Go down to Article 2 on the same page. And  
22 the last sentence of Article 2, what is provided with  
23 respect to how Broetje is agreeing to promote the sales of  
24 AHG's system?

25 A. Yes. Broetje agrees to promote the sales of the AHG

Bornes - direct

1 feed systems in the most loyal, serious and efficient way  
2 possible.

3 Q. So Broetje agreed to be loyal in promoting the sales  
4 of AHG's cassette system?

5 A. Yes.

6 Q. Let's turn to Article 4 at PTX-358T.14.

7 A. So, in fact, the dealer Broetje agrees not to sell  
8 directly or indirectly feed systems with identical or  
9 similar tubes to those under this contract and likely  
10 to compete with them, i.e., using the tube and box  
11 principle.

12 Q. Okay. And the box here, it uses the word "box."  
13 What does that refer to?

14 A. Box is used there for cassettes.

15 Q. Let's just show the jury, so there's no confusion  
16 here, let's look at the original French. If you could turn  
17 to Article 4, it's at PTX-358T3. And if you could look at  
18 the same provision and tell us what word is used there.

19 A. Yes.

20 Q. For the word "box."

21 A. We can see there that it's written "cassette."

22 Q. Okay.

23 A. I can read it in French, but I don't think it's --

24 Q. 358T3. It's T, 358T. That's okay.

25 A. Article 4.

Bornes - direct

1 Q. Article 4.

2 THE COURT: 358T. Not 358. Correct?

3 MR. HOROWITZ: Yes. Yes. Only lawyers could  
4 come up with this number system, but, yes. 358T. There we  
5 go.

6 BY MR. HOROWITZ:

7 Q. And I believe this is what Mr. Bornes just testified  
8 to. I'm not going to try (indicating). The word  
9 "cassettes"; right?

10 A. Yes.

11 Q. All right. Let's go back to Article 11, which is at  
12 PTX-358T.16.

13 What does Article 11 of the contract  
14 between AHG and Broetje provide? And what does it say?

15 A. The dealer agrees not to disclose to third parties  
16 the confidential documents and information provided to it by  
17 AHG in connection with this contract. The secrecy clause  
18 shall survive the expiration of this contract.

19 Q. And what does the next sentence say?

20 A. In addition, the dealer agrees not to use, directly  
21 or indirectly, such documents and information after the  
22 expiration of this contract.

23 Q. And who is the dealer here agreeing not to use  
24 directly or indirectly such documents and information after  
25 expiration of the contract?

Bornes - direct

1 A. This is for Broetje.

2 Q. Last provision I want to turn your attention to,  
3 Article 12, and, in particular, the second paragraph of  
4 Article 12. What is provided in that section?

5 A. In addition, in order to guarantee the end client the  
6 high quality of the technical results of the new rivet feed  
7 system of AHG, Broetje agrees to impose on all clients  
8 buying the AHG rivet feed system the exclusive use of the  
9 boxes, that means cassettes, specially developed and  
10 patented by AHG and intended for that new system. Indeed,  
11 such boxes allow to store a high number of rivets in an even  
12 manner and to improve their selective distribution.

13 Q. All right. And to be clear, again, the word "boxes"  
14 means what?

15 A. Cassettes.

16 Q. And is this again another reference to the fact that  
17 your system was patented?

18 A. Yes.

19 Q. And this is in the 1994 contract?

20 A. Yes.

21 Q. Now, did you consider this 1994 contract to be the  
22 beginning of a formal relationship with Broetje?

23 A. Yes.

24 Q. Let me turn you to PTX-167. Could you identify this  
25 PTX-167 for us, please?

Bornes - direct

1 A. Yes. It is mail that I received from Lutz Neugebauer  
2 from Broetje in July 2003.

3 Q. Okay. I apologize. PTX --that's the wrong exhibit.  
4 Let's try again. 167.

5 A. Oh, excuse me.

6 Q. That's okay. It happens.

7 A. Sorry.

8 Q. That's okay. Take your time. All right. Do you  
9 have PTX-167?

10 A. Yes.

11 Q. Okay. Could you tell us what PTX-167 is?

12 A. This is the fax I received from Mr. Holtmeier in  
13 2000.

14 Q. You said this was a fax you received from  
15 Mr. Holtmeier.

16 A. Yes.

17 Q. Take a look at who it's sent to and who signed it.

18 A. I'm sorry. It's a fax that I have sent to  
19 Mr. Holtmeier in 2000.

20 Q. And what did you attach to this fax that you sent to  
21 Mr. Holtmeier in 2000?

22 A. I attached European patent for the system.

23 Q. Let's?

24 MR. HOROWITZ: Let me offer in evidence PTX-167.

25 MR. KELLEHER: No objection.



Bornes - direct

1 THE COURT: It's admitted.

2 (PTX-167 was admitted into evidence.)

3 BY MR. HOROWITZ:

4 Q. What was your purpose in sending or faxing this  
5 letter with the European version of the patent to  
6 Mr. Holtmeier in January of 2000?

7 A. I just sent it to him because he requested it.

8 Q. He requested it?

9 A. Yes.

10 Q. And, again, Mr. Holtmeier was who?

11 A. He was the general manager for Broetje.

12 Q. And in the first sentence, you used, you say, the  
13 patent -- I will just read it: I send you the patent we had  
14 in Europe so that it will be also in German. This is the on  
15 the rifles into the tube.

16 What you did mean by the rival on the tube?

17 A. The grooves that we followed on the tube which is on  
18 our patented tube.

19 Q. The grooves in your tube?

20 A. Yes.

21 Q. How does this patent that you sent to Mr. Holtmeier  
22 in January of 2000 relate, if at all, to the United States  
23 patents we're here talking to this jury about?

24 A. So, in fact, this European patent is the mother  
25 patent from which we can -- we have a, also worldwide

Bornes - direct

1 patents and the U.S. patents.

2 Q. And I think you said the mother of the worldwide  
3 patents?

4 A. Yes.

5 Q. Including the U.S. patents?

6 A. Yes.

7 Q. If you turn quickly just to show the jury what we're  
8 talking about. If we could put up PTX-167.10 in this  
9 document 167.10. And while that's being pulled up, if you  
10 could just take a look, what is shown in PTX-167.10, the  
11 European version of the patent?

12 A. So we can see the tube with the groove inside, which  
13 is named 2B. The tube is filled with rivets and you have  
14 the two proper means, both sides of the tube.

15 Q. Okay. And let's bring up JTX-1.2, which is already  
16 in evidence, which is the U.S. patent. And how do these  
17 compare?

18 A. It's the same figures.

19 Q. The same figures?

20 A. Yes.

21 Q. Once you entered into this formal relationship or  
22 this contract with Broetje in 1994, how long did this  
23 relationship last?

24 A. It lasted from 1994 to, up to 2005.

25 Q. And during the course of that, about eleven-year

Bornes - direct

1 relationship, did Broetje request technical information  
2 regarding your system?

3 A. Yes. A lot of times.

4 Q. Okay. A lot of times?

5 A. Yes.

6 Q. Okay. What kind of information did Broetje request  
7 all the time?

8 A. They requested all they need to make sure the system  
9 is working and including drawings, schematics, everything  
10 they need to know exactly what was our system.

11 Q. Now, you said drawings and schematics and  
12 technological type of information?

13 A. Yes.

14 Q. Did AHG consider this type of information to be  
15 proprietary?

16 A. Yes.

17 Q. Did you provide it to Broetje even though you  
18 considered it to be proprietary?

19 A. Yes.

20 Q. Why did you give it to Broetje if it was proprietary  
21 to AHG?

22 A. It was in our agreement in 1994. I was protected  
23 from that.

24 Q. You thought you were protected?

25 A. Yes.

Bornes - direct

1 Q. Please turn to PTX-118. Give the jury just a brief  
2 example. When you get to PTX-118, if you could tell us what  
3 this is.

4 A. Yes. This is a -- it was a fax from Broetje, some  
5 technical information. It was done in 1994.

6 Q. October of 1994?

7 A. Yes.

8 Q. Yes?

9 A. Yes.

10 MR. HOROWITZ: Your Honor, I would offer in  
11 evidence PTX-118.

12 MR. KELLEHER: No objection.

13 THE COURT: It's admitted.

14 (PTX-118 was admitted into evidence.)

15 BY MR. HOROWITZ:

16 Q. And in this letter, what is it that you received  
17 from Broetje? What is it that they are requesting from  
18 you?

19 A. Okay. Regarding to your loading station, we want to  
20 please you to give us more detailed information (drawings,  
21 photos, and so on) during your stay in Wiefelstede on  
22 October 19th, 1994.

23 Q. And did you provide that kind of information when you  
24 went to Broetje?

25 A. Yes.

Bornes - direct

1 Q. And is this just but one example?

2 A. Yes.

3 Q. Did there come a time when you noticed a change in  
4 your relationship with Broetje?

5 A. Yes.

6 Q. When did you notice that change?

7 A. That was in 19 -- in 2002.

8 Q. Let's take a look at JTX-66 in your binder. What is  
9 JTX-66?

10 A. This is the e-mail I received from Mr. Maylander from  
11 Broetje in 2002.

12 Q. Did you say e-mail you received?

13 A. Yes.

14 Q. In June of 2002?

15 A. Yes.

16 Q. Who is Mr. Maylander?

17 A. Mr. Maylander is the director of marketing, in that  
18 time was director of marketing inside for Broetje.

19 Q. For Broetje?

20 A. Yes.

21 Q. An e-mail from Broetje to you?

22 A. Yes.

23 MR. HOROWITZ: Your Honor, I would offer into  
24 evidence JTX-66.

25 MR. KELLEHER: No objection.

Bornes - direct

1 THE COURT: It's admitted.

2 (JTX-66 was admitted into evidence.)

3 BY MR. HOROWITZ:

4 Q. What is the subject of the e-mail?

5 A. It was about a meeting we were having the week  
6 before.

7 Q. The first sentence in this e-mail from Mr. Maylander,  
8 he writes to you --

9 A. Yes.

10 Q. -- Dear Mr. Bornes, I have informed Mr. Holtmeier --  
11 again, is that the CEO of Broetje?

12 A. Yes.

13 Q. About your activities with Gemcore.

14 Do you see that?

15 A. Yes.

16 Q. What is that referring to?

17 A. The fact that we are selling our cassette system to  
18 Gemcore.

19 Q. Who is Gemcore?

20 A. Gemcore is an American company and they are making  
21 also automatic rivets.

22 Q. According to Mr. Maylander, in the next few sentences  
23 here when he wrote this e-mail to you in June of 2002, what  
24 was the CEO of Broetje's reaction, Mr. Holtmeier's reaction,  
25 to the fact you were doing business with Gemcore?

Bornes - direct

1 A. He is extremely disappointed and unhappy about your  
2 behavior especially because our both companies have  
3 developed an ARS with a lot of cost on both sides.

4 Now we are dealing with our main competitor,  
5 Gemcore, and with this deal Gemcore gets all the experience  
6 we have paid for.

7 Q. How does Mr. Maylander characterize Gemcore in this  
8 e-mail?

9 A. Said it was their main competitor.

10 Q. Main competitor?

11 A. Yes.

12 Q. Let's read the next sentence. He says, even taking  
13 the special discount for us respectively, the higher cost  
14 for Gemcore into consideration, he is upset.

15 A. Yes.

16 Q. Mr. Holtmeier is disappointed, unhappy, upset you're  
17 dealing with the main competitor. Is that what you were  
18 told?

19 A. Yes.

20 Q. Does this e-mail mention fault reports or technical  
21 problems with your system?

22 A. Not at all.

23 Q. Now, the e-mail says, both companies had developed an  
24 ARS, a system, a rivet system; right? Your system?

25 A. Yes.

Bornes - direct

1 Q. With a lot of cost on both sides.

2 Do you see that?

3 A. Yes.

4 Q. What was Broetje's role in the arrangement with AHG  
5 in its system? What was the role? Tell us. What did they  
6 do?

7 A. They're to buy systems from us in Germany and then  
8 install our system in, on their, their own machine.

9 Q. Did they provide technical input into your machine?

10 A. No.

11 Q. Did they provide financial input into your machine?

12 A. No.

13 Q. Okay. Who developed and maintained and put their  
14 money into this machine?

15 A. We did.

16 Q. We, being AHG?

17 A. And F2C2.

18 Q. Were there occasions when Broetje would provide you  
19 with complaints from customers?

20 A. Yes. We know they are requesting our system, direct  
21 contact with consumers, so when there is improvement to do,  
22 they tell us there's a need for that to be done.

23 Q. Is that the same thing as putting financial or  
24 technical information into your machine by Broetje?

25 A. I don't think it's the same.



Bornes - direct

1 Q. Now, had you always done business with other  
2 companies around the world besides Broetje?

3 A. Yes.

4 Q. Even before this e-mail?

5 A. Yes.

6 Q. How would you characterize the relationship between  
7 AHG and Broetje after you got this e-mail?

8 A. It changed a lot. It was less friendly. I received  
9 a full report and also angry letters and so on. So they  
10 wound up giving us that.

11 Q. Let's turn to PTX-657. What is PTX-657?

12 A. This is an e-mail I received from Mr. Neugebauer in  
13 2003.

14 Q. And who was Mr. Neugebauer working for when he sent  
15 you this e-mail?

16 A. He was project manager for Broetje.

17 MR. HOROWITZ: Your Honor, I would offer in  
18 evidence, PTX-657.

19 MR. KELLEHER: No objection.

20 THE COURT: It's admitted.

21 (PTX-657 is admitted into evidence.)

22 BY MR. HOROWITZ:

23 Q. And what was Mr. Neugebauer's role at Broetje?

24 A. He is the project manager.

25 Q. Now, in this e-mail to you, what is the date of this

Bornes - direct

1 e-mail?

2 A. It's 2003, in July.

3 Q. July of 2003. In this July 2003 e-mail to you, what  
4 does Mr. Neugebauer say with respect to Gemcor and your  
5 relationship with Gemcor?

6 A. So he says: Just between you and me, the company is  
7 very, very deeply "unsatisfied" concerning to the situation  
8 with Gemcor. There are several discussions in-house, and  
9 also with our mother company how to react on that obstacle.  
10 The situation is in that way, that nobody accepts that you  
11 are quoting together with Gemcor against us in new projects.  
12 (We understand that in retrofit and also only there where we  
13 are not quoting.) It seems to be that there is a  
14 possibility that we will quit the relationship with you.  
15 You should really think about a possible solution. (It's my  
16 opinion.)

17 Q. Mr. Neugebauer's e-mail references the mother company  
18 of Broetje. Who is that?

19 A. That is CLAAS.

20 Q. And who is CLAAS?

21 A. CLAAS is a German company.

22 Q. And he told you in this e-mail that there is a  
23 possibility that Broetje is going to quit the relationship  
24 with you because you are doing business with Gemcor; is that  
25 right?

Bornes - direct

1 A. Yes.

2 Q. Again, does this e-mail, at the time, at the time in  
3 July of 2003, mention fault reports?

4 A. No.

5 Q. Does it mention technical problems?

6 A. No.

7 Q. Does it suggest you should try and find a solution  
8 that so that they can continue to do business?

9 A. No.

10 Q. Let me ask it this way. What is the reason given  
11 here that Gemcor is thinking about not doing business -- I'm  
12 sorry -- that Broetje is thinking about not doing business  
13 anymore?

14 A. It's because I was doing business with Gemcor.

15 Q. Now, let's talk about these fault reports and  
16 technical issues for a moment. Over your 11 year  
17 relationship with Broetje, how many cassettes did you sell  
18 to them?

19 A. Thousands.

20 Q. Did any of those thousands of cassettes ever have  
21 technical problems?

22 A. Yes. Sometimes, yes.

23 Q. What was the process with Broetje when they would buy  
24 a system from you to resell to one of its customers?

25 Explain to the jury how that worked.

Bornes - direct

1 A. Well, in fact, they were building the machine. We  
2 send our system. We first make the system. We make the  
3 cassette on it, and then we send it to Broetje. Then there  
4 the machine was installed on their own riveter. All the  
5 test verify that everything was working well. Then they  
6 disassemble the system, they send it to the final customer,  
7 and then they reinstall it. That work for months, even a  
8 year.

9 Q. And in that process, when, and under what  
10 circumstances, did technical problems with your cassettes  
11 usually arise?

12 A. It arrives usually just at the beginning when we make  
13 the first test, and we, we solve them, and it works.

14 Q. Okay. And are you talking about when you first  
15 install them at Broetje or when Broetje disassembles it and  
16 sends it to the customer or both?

17 A. Excuse me. (Witness and translator confer.)

18 Yes. In fact, it could be both, you know,  
19 because in between each of this iteration, there has been  
20 some transportation and during some transportation and fine  
21 tuning, it could be this, I would say, needed to be done  
22 again.

23 Q. So when the cassettes are in the system when first  
24 installed is usually when this arose?

25 A. Yes.

Bornes - direct

1 Q. What would AHG and then F2C2 do when it received a  
2 fault report or a report of a technical problem?

3 A. We try to solve it as quick as possible, solve the  
4 problem.

5 Q. Did your agreement allow Broetje to make cassettes  
6 and sell them in place of yours if there were technical  
7 problems with your cassettes?

8 A. Not at all.

9 Q. Did Broetje ever come to you and tell you that they  
10 were developing their own cassettes because of extensive  
11 fault reports?

12 A. No.

13 Q. Did any of your other customers stop doing business  
14 with you because of extensive technical problems?

15 A. No.

16 Q. Now, did there come a time when you became aware that  
17 Broetje had begun selling its own cassettes?

18 A. Yes.

19 Q. When did you first learn this?

20 A. It was in 2005, in Germany.

21 Q. And how did you become aware in 2005 in Germany?

22 A. Because I had been in the plants in Germany where I  
23 have to work on one of our system and I saw these cassettes.

24 Q. And you saw whose cassettes?

25 A. Broetje cassettes. They were plugged in our rack and

Bornes - direct

1 loading station.

2 Q. So to be clear, you saw Broetje's racks in AHG's  
3 loading stations?

4 A. Broetje cassettes, yes.

5 Q. I'm sorry. Broetje cassettes in AHG's loading  
6 stations?

7 A. Yes.

8 Q. And Broetje's cassettes in AHG's racks?

9 A. Yes.

10 Q. And this was in 2005 in Germany?

11 A. Yes.

12 Q. Prior to seeing this in 2005 in Germany, were you  
13 aware that they were making their own cassettes?

14 A. No.

15 Q. Again, had Broetje ever told you that they were doing  
16 this?

17 A. No.

18 Q. Now, did you and AHG consult with lawyers when you  
19 found out that this was happening?

20 A. Excuse me. (Translator and witness confer.)

21 Yes.

22 Q. Okay.

23 A. Yes.

24 Q. Lawyers in France?

25 A. Yes.

Bornes - direct

1 Q. Let's turn to PTX-547.

2 A. (Witness complies.)

3 Q. What is PTX-547?

4 A. It is the letter from our lawyer about this case.

5 Q. And were you involved in working with the lawyers on  
6 that case?

7 A. Yes.

8 Q. Okay.

9 MR. HOROWITZ: Your Honor, I would offer --

10 BY MR. HOROWITZ:

11 Q. What's the date of the letter? I'm sorry.

12 A. Yes, it's April 2005.

13 Q. Okay. Is it sent from yours lawyers to Broetje?

14 A. Yes.

15 MR. HOROWITZ: Your Honor, I would offer in  
16 PTX-547.

17 MR. KELLEHER: I have no objection subject to  
18 the earlier discussion.

19 THE COURT: It is admitted.

20 (PTX-547 is admitted into evidence.)

21 BY MR. HOROWITZ:

22 Q. Please turn to PTX-547.8.

23 A. (Witness complies.)

24 Q. What does the letter from AHG's lawyers to Broetje  
25 tell Broetje with respect to providing them formal notice of

Bornes - direct

1     infringement?

2     A.       This letter also serves as a formal notice to cease  
3     all acts of infringement or unfair competition in this  
4     regard, as my client hereinafter reserves the right to the  
5     claims that it might bring before the courts.

6     Q.       Thank you. Did you find out even after this letter  
7     that Broetje was selling its cassettes anywhere else in the  
8     world other than Germany?

9     A.       Yes, they did it in France.

10    Q.       And what year did you find out in France?

11    A.       In 2006.

12    Q.       Again, when the cassettes were seen in France in  
13    2006, whose racks and loading stations were their cassettes  
14    being used with?

15    A.       In that time, I think it was also in AHG loading  
16    station.

17    Q.       When you found out about the cassettes in Germany in  
18    2005, and the cassettes in France in 2006, did you try and  
19    discover whether this was also happening here in the United  
20    States?

21    A.       No, because it's not possible.

22    Q.       Why was it impossible to do that?

23    A.       Because I'm from a small French company and the only  
24    way to see their cassettes in the states is to be in plant  
25    where they are, and it is I cannot come there in the



Bornes - direct

1 manufacturers and say I just want to visit your plant to see  
2 something like that. So the only way to be inside is to be  
3 invited by this company, and you are always escorted when  
4 you are there, so you can't go anywhere. It's the only way  
5 for us to really know if they are using cassettes in the  
6 states.

7 Q. It really wasn't possible?

8 A. Yes.

9 Q. Have you personally seen Broetje's cassettes?

10 A. Yes.

11 Q. And when you saw Broetje's cassettes, how did they  
12 compare to AHG's cassettes when you were looking at them?

13 A. It's looking the same.

14 Q. Have you seen the tubes that Broetje uses inside its  
15 cassettes?

16 A. Yes.

17 Q. What shape of the tube are they using?

18 A. The internal pentagonal shape.

19 Q. The pentagon shape?

20 A. Yes.

21 Q. And with respect to the outer appearance of Broetje's  
22 cassettes, you said they look the same. What features in  
23 particular made them look the same to you?

24 A. They are the same cover. They have the same aluminum  
25 casing. They have the same white end. They have the same

Bornes - direct

1 inlet and outlet. It's really looks like the same.

2 Q. When you developed your cassettes with the look that  
3 you just described for the jury, were you focused on the  
4 appearance of the cassette?

5 A. Yes, sure.

6 Q. What design features or what look did you  
7 specifically choose for your cassette?

8 A. So for the cassette, we wanted them to have a look  
9 like a briefcase with the handle because they are needed.  
10 They are used to transport the rivet from the loading  
11 station to the racks, so we needed to carry them, in order  
12 to have this type of flow.

13 And when we use this type of aluminum metal and  
14 black handle and plastic is complete system. The rack are  
15 the same. The loading station are the same.

16 Q. Okay. So you used it not only on the cassettes but  
17 also the racks and station, so the AHG system?

18 A. Yes. In that time, all people making this type of  
19 system were using the system with the machines, so it was  
20 different than the other. It was like one to us.

21 Q. Did you choose these features that you just described  
22 for us on the cassette in particular? Did you choose them  
23 for functional purposes only?

24 A. No.

25 Q. Did some of them have functional purposes?

Bornes - direct

1 A. Yes, sure.

2 Q. Did you choose them for their functional purposes or  
3 for some other reason?

4 A. We choose them for the look first because we could  
5 not have any kind of other color or anything. The function  
6 is just if you think about the handle, the function of the  
7 handle is the handle. But the color, the shape, the  
8 dimension, where you place it is the function.

9 Q. Whose name appeared -- are you okay?

10 A. Yeah. Yeah.

11 Q. Whose name appeared on your cassettes?

12 A. In the cassette, there were name AHG, and then F2C2  
13 and AHG.

14 Q. Where did AHG and F2C2 advertise its cassettes?

15 A. We advertise them in the trade show like Paris air  
16 show. Also in show like Aerofast from SAE in states. Also  
17 when we visit our customers.

18 Q. And we went through this a bit yesterday. The jury  
19 saw some of those flyers you would use at trade shows?

20 A. Yes.

21 Q. Was it all around the world that you would advertise  
22 your cassettes?

23 A. Yes.

24 Q. With this appearance that you described?

25 A. Yes.

Bornes - direct

1 Q. When did you come up with this design for your  
2 cassette?

3 A. Early 90s.

4 Q. And in the first years you sold your cassettes in the  
5 early 1990s, did it have the all aluminum sides or the metal  
6 box look that has been, or the metal box that has been  
7 referred to here?

8 MR. KELLEHER: Objection, Your Honor. Leading.

9 THE COURT: Overruled. He can answer.

10 THE WITNESS: Excuse me?

11 THE COURT: You can answer the question.

12 THE WITNESS: Can you repeat?

13 BY MR. HOROWITZ:

14 Q. When you first sold your cassettes in the early  
15 1990s, and you described for us its appearance, when you  
16 first sold it, did it have the aluminum on all the sides?

17 A. Yes.

18 MR. KELLEHER: Objection, Your Honor. Motion in  
19 limine.

20 THE COURT: I'll see you at sidebar.

21 (Sidebar conference held.)

22 THE COURT: First, just for the record, on the  
23 leading, yes, strictly speaking there has been a lot of  
24 leading but with the language problems, I thin, it's kind of  
25 necessary so the jury can actually get what he is saying.

Bornes - direct

1 MR. KELLEHER: That's why I have not objected.

2 THE COURT: And I appreciate that. So that was  
3 my thinking. But what is the motion in limine?

4 MR. KELLEHER: We had a motion in limine, Your  
5 Honor, concerning the geographical limits of trademark and  
6 trade dress law where the sale was not in the U.S.

7 MR. CAHR: And you cannot establish trade dress  
8 rights based on the appearance that you used in the other  
9 country, only the appearance you made in commerce in the  
10 United States. And there is no allegation in this case that  
11 they made those sales in the early '90s in the United States  
12 with the metal box.

13 MR. LINDVALL: Your Honor.

14 MR. HOROWITZ: Mr. Lindvall wants to respond.

15 MR. LINDVALL: Your Honor, in the MIL they  
16 precluded us from using any instances of actual confusion  
17 outside the United States. That was the MIL. And you  
18 granted their motion and said we cannot refer to any  
19 instances of actual confusion outside the United States.  
20 Because we did have confusion in Ireland since. We want to  
21 get that into evidence and move on. You granted that. That  
22 was the limit of the MIL.

23 THE COURT: What you are doing is just  
24 establishing where it was sold, what it looked like?

25 MR. HOROWITZ: Yes.

Bornes - direct

1 THE COURT: You are not getting into confusion?

2 MR. HOROWITZ: No, I'm not. Also, that was  
3 also a few questions ago. Now I'm establishing -- I keep  
4 forgetting my question. It was objected to but it's not  
5 that issue at all.

6 Oh, it's the cassette came out in the '90s with  
7 the aluminum sides when they first started selling it.

8 MR. CAHR: But that only goes to secondary  
9 meaning, and secondary meaning is only relevant as to when  
10 it was, how it was sold in the U.S., and so the look of any  
11 cassettes sold outside the United States is irrelevant to  
12 secondary meaning.

13 THE COURT: I think they are telling the story  
14 and the chronology including the parties' relationship, the  
15 development of the product.

16 MR. CAHR: Okay.

17 THE COURT: Do you disagree with that?

18 MR. CAHR: I do, but ...

19 THE COURT: Okay.

20 MR. CAHR: I can tell you ruled.

21 THE COURT: Is there anything you want to add?

22 MR. KELLEHER: I'll leave it at that, Your  
23 Honor.

24 THE COURT: Okay. Then I'm overruling the  
25 objection. You can continue.

Bornes - direct

1 (Sidebar conference ends.)

2 THE COURT: You can continue.

3 BY MR. HOROWITZ:

4 Q. Mr. Bornes, the first years you sold your cassettes  
5 in the early 1990s, did it have all the all aluminum sides  
6 that you described?

7 A. Yes. The first one, yes.

8 Q. Did there come a time later in the '90s when you  
9 switched to these plastic sides?

10 A. Yes.

11 Q. In switching to the plastic a few years later, how  
12 did you think that would affect the overall look of the  
13 cassettes?

14 A. The same.

15 Q. And did there come a time when you went back to the  
16 aluminum sides?

17 A. Yes.

18 Q. Why did you go back to the aluminum sides?

19 A. Because in fact it was the use of the cassette, we  
20 have first have some problem of cracks on the plastic where  
21 the handle was. Because when you slide in and out the  
22 cassette on the rack, it was hard. You know, you can have  
23 cracks.

24 Q. Keep the microphone in front of you so they can hear.

25 A. Excuse me.

Bornes - direct

1 Q. I know it's tough.

2 A. I have a problem.

3 THE COURT: The microphone moves as well.

4 BY MR. HOROWITZ:

5 Q. Yes. There you go.

6 A. Because when you slide the cassette in and out of the  
7 racks, you have pressure on the handle of the cassette and  
8 it cause some cracks on it. So when we first use them, the  
9 way to solve it was with bigger washer on aluminum plate,  
10 but then you come back to the complete aluminum casing.

11 And also we have experience some squash on the  
12 plastic on the side when you slide it in and out, so you  
13 know it has no need to keep the plastic on this case and it  
14 was cheaper to make it with the aluminum casing.

15 Q. So you went back to the aluminum?

16 A. Yes.

17 Q. Before switching back to the aluminum, what  
18 communications, if any, did you have at Broetje about your  
19 plans to do so?

20 A. So when we have these cracks at the beginning, we  
21 took some I would say feedback from Broetje from the  
22 customers, so we have talk with them about that, and we said  
23 that we, it was possible solution to go back to complete  
24 casing aluminum, but, in fact, first of all, we begin to try  
25 to find a solution without to do that.



Bornes - direct

1 Q. When you had these conversations with Broetje about  
2 that possibility of going back to the aluminum sides, what  
3 year was that?

4 A. It was prior to 2003.

5 MR. HOROWITZ: Your Honor, may I approach?

6 THE COURT: You may.

7 MR. HOROWITZ: Actually, Your Honor, what would  
8 be best here is if the witness could step down into the well  
9 and use the physical exhibits.

10 THE COURT: He may do so.

11 And, Mr. Kelleher, if you need to move around in  
12 order to be able to see, that's fine.

13 MR. HOROWITZ: Your Honor, may I move this table  
14 into the well?

15 THE COURT: Yes.

16 BY MR. HOROWITZ:

17 Q. Let me first show you Mr. Bornes JTX-64A and ask if  
18 you could identify that cassette for us?

19 A. This is a --

20 THE COURT: And try to keep your voice up so we  
21 can all hear you.

22 THE WITNESS: Yes, excuse me. Sorry.

23 BY MR. HOROWITZ:

24 Q. You can use the table if you need to. That's why  
25 it's here.

Bornes - direct

1 A. That is an AHG cassette.

2 Q. And let me show you JTX-3 and ask you to identify  
3 that for us, please.

4 A. This is the Broetje cassette.

5 Q. And one more. Let me show you DTX-1223A and ask you  
6 to identify that, please.

7 A. This is also an AHG cassette. The one with the  
8 plastic around the sides.

9 MR. HOROWITZ: And, Your Honor, I would move  
10 into evidence JTX-3 -- well, offer to move into evidence,  
11 JTX-3, JTX-64A and DTX-1223A.

12 MR. KELLEHER: No objection.

13 THE COURT: Those are all admitted.

14 (JTX-3, JTX-64A, DTX-1223A admitted into evidence.)

15 BY MR. HOROWITZ:

16 Q. Now, Mr. Bornes, can you show us with JTX-3, the  
17 Broetje cassette, and JTX-64A, the AHG cassette with the  
18 metal sides, when you were talking about the features that  
19 you said were the same when you first saw the Broetje  
20 cassette, can you point those out for the jury?

21 A. Yes. So you can see on the top, the same plastic.  
22 You have the aluminum cases. You can see the under is the  
23 same. If you look to the inlet and outlet, they are the  
24 same plastic and same black metal. And if you put them into  
25 an AHG rack, it will be working both of them.

Bornes - direct

1 Q. Mr. Bornes, why don't you put down the AHG cassette,  
2 64A, the aluminum one, and pick up the plastic one and show  
3 us, in terms of the features that you were referencing when  
4 you said it was the same, why you thought that and try to  
5 explain it?

6 THE COURT: Mr. Bornes, do your best to speak  
7 up, please, so we can hear you.

8 THE WITNESS: Yes. Excuse me.

9 BY THE WITNESS:

10 A. So you can see they are similar.

11 Q. And what features in particular? Can you point those  
12 out to the jury?

13 A. They're the same, the same handle, black handle. You  
14 have also aluminum casing. You have the same inlet and  
15 outlet. So for me, it look like the same.

16 Q. Mr. Bornes, you can put down all the cassettes but  
17 the Broetje one. Keep the Broetje one, if you would please.  
18 I want to ask you now, is there something called a  
19 microactuator on this cassette?

20 A. Yes.

21 Q. Can you point it out to the jury?

22 A. It's a system which is just inside there.

23 Q. Okay. Now is the microactuator in a different place  
24 on your two cassettes?

25 A. Yes.

Bornes - direct

1 Q. Okay.

2 A. In our cassette system is here, outside the cassette.

3 Q. In 2003 -- are you with me?

4 A. Yes.

5 Q. What, if anything, was sent to Broetje with respect  
6 to microactuators inside the cassette?

7 A. Yes. In fact, in 2003, Broetje ask us to work on a  
8 cassette which make sure that it was not possible to send  
9 two rivets at the same time. On the other cassette, we have  
10 some microactuator where with very big blow, we can put two  
11 rivets going out. So they ask us to work on one system. So  
12 we develop a system with microactuator like on this  
13 cassette. We sent them 10 cassettes and also drawings and  
14 all documents to understand the way it works.

15 Q. Ten cassettes in 2003 with the microactuator inside  
16 the cassettes and the technical drawings?

17 A. Excuse me?

18 Q. And the technical drawings?

19 A. Yes.

20 Q. If you could pick up the plastic cassette. I'm  
21 trying to create record here. It's easier said than that  
22 done. DTX-1223A, and then look at the bottom of it.

23 If you could put it on the table in front of the  
24 jury, so you can pick up the next Komaki September.

25 JTX-3, the Broetje cassette, yes. And show the

Bornes - direct

1 jury the bottom. Is there a white plastic piece on the  
2 bottom?

3 A. Yes, here and there.

4 Q. What does that do?

5 A. In fact, this has no functional reason. It's because  
6 before using this small label, we were using only the minute  
7 system, and this system was bigger than this one. So they  
8 go inside the cassette because it was tubing. So this is  
9 only needed to, I would say, to cover the hole which was  
10 done before.

11 Q. It was just plastic filler to cover the hole?

12 A. Yes.

13 Q. And the fact that that appeared in Broetje's  
14 cassettes, what does that tell you about its relationship to  
15 your cassette?

16 A. That means they copy our cassette because there is no  
17 need for that. Then when we redesign after having put all  
18 our stuff on this type of aluminum box, we just make this.  
19 Because there is no need for this big plastic. This is only  
20 spacer to have the right position here.

21 Q. So when you redesigned your cassette because you no  
22 longer had the boxes that had the plastic piece on the  
23 bottom, it was changed?

24 A. Yes.

25 MR. HOROWITZ: Stand there for a second. We're

Bornes - direct

1 done with those cassettes.

2 If he may, Your Honor, I have two more cassettes  
3 to show them.

4 THE COURT: Two more?

5 MR. HOROWITZ: Yes.

6 THE COURT: Are you able to hear this,  
7 Mr. Kelleher?

8 MR. KELLEHER: Pretty much, Your Honor.

9 THE COURT: All right. You can continue.

10 BY MR. HOROWITZ:

11 Q. All right. I'm going to try to do this at once to  
12 move this along. One of these is PTX-569. Let me hand you  
13 PTX-569. Well, we'll do them one at a time. Can you tell  
14 the jury what that is, PTX-569?

15 A. This is a cassette done by Hawk system.

16 Q. Who is Hawk?

17 A. Hawk is a rivet manufacturer in the United States.

18 MR. HOROWITZ: Okay. Your Honor, I would offer  
19 PTX-569 in evidence.

20 MR. KELLEHER: No objection.

21 THE COURT: It's admitted.

22 (PTX-569 is admitted into evidence.)

23 BY MR. HOROWITZ:

24 Q. Just describe for the jury what the Hawk cassette is,  
25 what you are holding there.

Bornes - direct

1 A. So, in fact, it's made with two rude parts, with a  
2 spacer; and there, there is a rolled tube inside.

3 Q. Could this kind of cassette, the Hawk cassette, ever  
4 be used with an AHG loading station or rack?

5 A. No, it is not possible.

6 Q. Let's put that down.

7 A. (Witness complies.)

8 Q. And here is PTX-570. If you could tell us what  
9 PTX-570 is?

10 A. It's also a cassette made by ElectroImpact.

11 Q. And who is ElectroImpact?

12 A. It is an American riveting system, machine  
13 manufacturer.

14 Q. And could that ElectroImpact cassette ever be used  
15 with AHG racks?

16 A. No. And, in fact, while our cassette is used like  
17 they are here, this one where you vertically use it.

18 Q. So whose cassette was ElectroImpact using when you  
19 left F2C2?

20 A. Yeah.

21 Q. Whose were they using?

22 A. Whose?

23 Q. Whose cassette.

24 A. ElectroImpact were using their own cassette system.

25 Q. Did there come a time when they switched?

Bornes - direct

1 A. Yes.

2 Q. Who did they switch to?

3 A. They switch to AHG system.

4 Q. The last thing I want before you sit down. You can  
5 put that down.

6 A. (Witness complies.)

7 Q. If you could show the jury what the cassettes, when  
8 they're stacked in racks, would look like when you are  
9 walking through a factory floor?

10 A. Just like that (indicating).

11 Q. So if you are walking through a factory floor, you  
12 stack them one on top of the other. You have stacked JTX-3,  
13 JTX-64A and DTX-1223A on top of each other with the handles  
14 facing the jury. Is that the view that you would have if  
15 you are walking through the factory with racks?

16 A. Yes.

17 Q. Or in loading stations?

18 A. Yes.

19 Q. Mr. Bornes, we're done with the demonstration. If  
20 you could return to your seat? Thank you.

21 A. (Witness complies.)

22 Q. Mr. Bornes, do you know of any other successful  
23 cassette-based system that is being used besides AHG, F2C2  
24 System or Broetje System?

25 A. That's working now or?



Bornes - cross

1 Q. Yes, that work. That are successful.

2 A. No, except Broetje.

3 Q. Okay. So AHG and Broetje?

4 A. Yes.

5 Q. When Broetje began selling its own cassettes, did it  
6 have any impact on your business?

7 A. Yes, we lost a lot of sale because they were our main  
8 customer. So because of that, AHG -- F2C2 System lost a big  
9 amount of money. And that I was not able to give this money  
10 on to company, I lost my shares and my job.

11 Q. You lost your shares and your job?

12 A. Yes.

13 MR. HOROWITZ: No further questions at this  
14 time, Your Honor.

15 THE COURT: Okay. Thank you. We'll have  
16 cross-examination.

17 MR. KELLEHER: Your Honor, could I approach?

18 THE COURT: You may. Yes.

19 MR. KELLEHER: Your Honor, could I hand a  
20 witness binder to the witness?

21 THE COURT: Yes, you may do so.

22 CROSS-EXAMINATION

23 BY MR. KELLEHER:

24 Q. Mr. Bornes, customers do not choose, make their  
25 decision to buy cassettes like this when they're sitting

Bornes - cross

1 stacked in aircraft manufacturing facility, do they?

2 A. Can you just -- I'm sorry. I'm not used to your  
3 voice.

4 Q. Yes. A customer like Boeing --

5 A. Yes.

6 Q. -- does not make the decision to purchase cassettes  
7 like this when they are sitting on a factory floor stacked  
8 like this?

9 A. Yes.

10 Q. You say that you have known since at least 2005 that  
11 Broetje has been selling their own cassettes; correct?

12 A. Yes.

13 Q. And that is because you discovered them at an Airbus  
14 facility in Nordenham, Germany?

15 A. Yes.

16 Q. And the reason you noticed they were Broetje  
17 cassettes is because it says Broetje right here on the  
18 front?

19 A. In fact, it was look like that. I need a lot of time  
20 to realize that they were Broetje cassettes on this machine.

21 Q. It took --

22 A. And then also when I approach, I see that label.

23 Sure.

24 Q. You saw the label?

25 A. Yes.

Bornes - cross

1 Q. And why did you bother approaching if you hadn't seen  
2 the label yet? Did they look different?

3 A. Not that much, but I have to look to see, yes, what  
4 we are looking.

5 Q. So what aroused your curiosity? The fact that it was  
6 metal instead of plastic?

7 A. I don't remember exactly.

8 Q. There were no metal F2C2 cassettes at Nordenham at  
9 that time, were there; is that correct?

10 A. Yes. No, it wasn't.

11 Q. Do you remember a Broetje project in Dallas, Texas in  
12 2004 for the company called Vought, sometimes called  
13 Triumph?

14 A. Yes.

15 Q. And do you remember, that was Project 1588 and 1589?

16 A. I think so. I cannot tell you that right now.

17 Q. And for that project, my client, Broetje, ordered a  
18 number of racks from F2C2?

19 A. Yes.

20 Q. And they also ordered a number of loading stations;  
21 is that correct?

22 A. Yes.

23 Q. And they did not order any cassettes?

24 A. They ordered cassettes. 2,000 cassettes.

25 Q. I'm sorry. For that project --

Bornes - cross

1 A. Yes.

2 Q. -- they did not order any cassettes?

3 A. They actually ordered 200 cassettes and then they  
4 canceled the order.

5 Q. And when did they cancel the order?

6 A. I don't remember.

7 Q. And they never renewed the order?

8 A. Excuse me?

9 Q. They never renewed the order?

10 A. No. No.

11 Q. And you asked several times of Mr. Neugebauer when  
12 the order was going to be renewed; is that correct?

13 A. Yes.

14 Q. And it never was?

15 A. Yes.

16 Q. But you delivered the racks?

17 A. Yes.

18 Q. And you delivered the loading stations?

19 A. Yes.

20 Q. And so you knew that Broetje had a machine for its  
21 customer in Dallas, Texas in 2004 that had racks and loading  
22 stations, but no F2C2 cassettes?

23 A. Yes.

24 Q. And didn't you find that suspicious?

25 A. You know, I just want -- I was working with Broetje

Bornes - cross

1 for a lot of time, so I was -- I told them and, in fact, I  
2 have already seen some project where some manufacturer buy  
3 new machines and never use it. So I don't know if something  
4 changed. They did not want to buy the cassettes if they  
5 know they don't want to use the machine, and Broetje never  
6 said to me that they didn't -- why did it cancel this order  
7 of cassettes? So how could I know it?

8 Q. Mr. Bornes, in the witness binder that my opponent  
9 used with you, could you turn to PTX-547.

10 A. Yours? It's yours?

11 Q. I'm sorry. My friend here. The other binder.

12 A. Okay. What number?

13 Q. 547.

14 MR. KELLEHER: Your Honor, this has been  
15 admitted. Could I put it on the screen?

16 THE COURT: You may, yes. Mr. Bornes, we'll  
17 also show it on the big screen and probably the little one,  
18 too.

19 THE WITNESS: Yes.

20 BY MR. KELLEHER:

21 Q. Could we please turn to page 3 of the English  
22 language translation, which would be page .7.

23 Mr. Bornes, you'll see the third paragraph from  
24 the bottom. In fact, on several occasions, you ordered  
25 racks that were delivered to the end customer without the

Bornes - cross

1 corresponding cassettes being ordered from my client.

2 Do you see that?

3 A. Yes.

4 Q. The Vought project is one of those; is that correct?

5 A. I think it's the only one.

6 Q. The only one. So your lawyers put that in this  
7 letter as being something suspicious; isn't that correct?

8 A. Yes.

9 Q. Do you know a gentleman --

10 A. Let me -- this was written after we knew that you  
11 were making cassettes. So you know we can think about that  
12 after a while.

13 Q. And you know a gentleman named Ray Lecann,  
14 L-a-c-a-n-n?

15 A. Yes.

16 Q. All right. Was he your sales representative in the  
17 United States?

18 A. Yes.

19 Q. And he's a dual French/United States citizen; is that  
20 correct?

21 A. Yes.

22 Q. So he could visit aircraft facilities, is that  
23 correct, without the problems that a French citizen would  
24 have?

25 A. I don't know if he can just come there. I don't

Bornes - cross

1 know.

2 Q. Broetje has many employees who are German citizens;  
3 is that right?

4 A. Yes.

5 Q. And they gain access to these facilities in the  
6 United States; is that right?

7 A. Yes. If you are invited by the customer to come on a  
8 specific place, you can. I have been there, too, but if I  
9 want to go in a place where I've never been, where no  
10 machines, I can't, I can't, because I have no reason to come  
11 there and nobody would say, okay. Come and visit my  
12 company. If I have some work to do someplace, it's  
13 possible, sure, but if not, it's impossible.

14 Q. And where was it in the United States that you first  
15 saw Broetje brand cassettes?

16 A. It was -- in fact, it was in Spirit, I think.

17 Q. Spirit, so Wichita?

18 A. Yes.

19 Q. And were you invited there to do repairs?

20 A. Yes.

21 Q. I wonder, Mr. Bornes, during the period of time when  
22 you sold your cassettes to my client and they installed the  
23 racks and the cassettes into their machine, did you ever  
24 sell cassettes that had the Broetje name on them?

25 A. No.

Bornes - cross

1 Q. Would you please look to JTX-65 in the binder that I  
2 gave you.

3 A. Yes.

4 Q. This is the second Amended Complaint in this lawsuit  
5 by AHG and F2C2 against my two clients.

6 Have you seen this document before?

7 A. Before? No.

8 MR. KELLEHER: Your Honor, given what it is,  
9 could I publish one paragraph on the screen?

10 THE COURT: Is there an objection?

11 MR. HOROWITZ: Your Honor, I think I would have  
12 to object. It's not in evidence.

13 THE COURT: Tell us which paragraph by number.

14 MR. KELLEHER: Paragraph 26.

15 MR. HOROWITZ: Your Honor, I maintain my  
16 objection.

17 MR. KELLEHER: And, Your Honor, I would offer  
18 this paragraph as a statement by my party opponent.

19 THE COURT: Hold on a second. 26. Is that  
20 correct?

21 MR. KELLEHER: Yes.

22 THE COURT: We are looking at JTX-5; is that  
23 correct?

24 MR. KELLEHER: Yes, Your Honor.

25 THE COURT: The document filed 9/3/09; is that



Bornes - cross

1 correct?

2 MR. KELLEHER: Correct.

3 THE COURT: So your request is to show just that  
4 paragraph?

5 MR. KELLEHER: Just paragraph 26.

6 THE COURT: To the jury.

7 And the objection is?

8 MR. HOROWITZ: The objection is it's hearsay,  
9 it's a legal document, and there's no foundation for using  
10 it with this witness.

11 THE COURT: Could you establish a foundation  
12 with the witness?

13 MR. KELLEHER: Well, first, it's a statement by  
14 the party opponent, so it's not hearsay.

15 BY MR. KELLEHER:

16 Q. Mr. --

17 THE COURT: I'm just asking you, you're willing  
18 to do that; is that correct?

19 MR. KELLEHER: Yes.

20 THE COURT: Okay. I'm going to overrule the  
21 objection subject to laying the foundation. We will only,  
22 if there is a foundation, show that paragraph to the jury.

23 MR. KELLEHER: Okay.

24 BY MR. KELLEHER:

25 Q. Mr. Bornes, your client began -- I'm sorry. AHG and

Bornes - cross

1 F2C2 began suing my client in 2006, I believe?

2 A. Yes.

3 Q. You were still with the company at that time?

4 A. Yes.

5 Q. And so first we were sued in Germany?

6 A. Yes.

7 Q. And then we were sued in France?

8 A. I think for the Germany, yes, and for the French, no.

9 Q. We were not sued in France?

10 A. No, no. I was not there I think. It was the second  
11 part of 2007 in France and I quit in July.

12 Q. Right. But you're aware that AHG and F2C2 sued my  
13 clients in France?

14 A. Yes.

15 Q. And you are also aware that your, AHG and F2C2 sued  
16 my clients here in the United States, which is why you are  
17 here today?

18 A. Not at that time.

19 Q. You're aware now, though; right?

20 A. Well, yes, sure. Now, yes.

21 Q. And you are sitting at counsel table as the corporate  
22 representative?

23 A. Yes.

24 Q. Isn't that correct?

25 A. Yes.

Bornes - cross

1 MR. KELLEHER: Your Honor, I would move to  
2 publish paragraph 26.

3 THE COURT: Still an objection?

4 MR. HOROWITZ: No objection.

5 THE COURT: No objection? You may do it.

6 BY MR. KELLEHER:

7 Q. So, Mr. Bornes, this says, Upon information and  
8 belief, it was commonly recognized by the industry that the  
9 rivet dispensing products provided by Broetje and that bore  
10 the Broetje brand had originated with and were manufactured  
11 by AHG.

12 Do you see that?

13 A. Yes.

14 Q. That's not true, is it?

15 A. People seeing our products and machines and know that  
16 it was our system. I can -- just let me read again.

17 THE COURT: You're going to translate that for  
18 him? Okay.

19 (Pause while the witness and the translator  
20 conferred.)

21 THE WITNESS: For me, it's true. If I would  
22 understand, I understand that this means that at the  
23 beginning, when Broetje used the cassette system, they start  
24 on their machine. Everybody in the world knows that this  
25 system were made by AHG. That's true.

Bornes - cross

1 BY MR. KELLEHER:

2 Q. And that, and that's what --

3 A. And they were aware of the Broetje label on the  
4 machine. That's true.

5 Q. This says the rivet dispensing product that bore the  
6 Broetje brand.

7 Do you see that?

8 A. Yes, but it was -- it says that it was before they  
9 put their label, it was done by AHG.

10 Q. And those things, this document says bore the Broetje  
11 brand when, in fact, you never provided rivet dispensing  
12 products to my client that bore the Broetje brand. They  
13 always said F2C2 and AHG; is that right?

14 A. Yes. Yes. It's confusing from my point of view.

15 Q. So you and --

16 A. You know, I didn't -- I said yes, but I never been  
17 everywhere where you have placed machines, and also what I  
18 know is at the beginning, when we put the AHG sticker on the  
19 machine, Broetje throw them away to make sure that nobody  
20 see AHG.

21 So you could have also made some labels  
22 after if I don't see them. I cannot assure that you never  
23 delivered cassettes with labels, but I cannot assure that  
24 you did not.

25 Q. You cannot assure that we did either?

Bornes - cross

1 A. Sure.

2 Q. You've never gone to a facility and seen a cassette  
3 where my client took the plastic lid off and ripped out your  
4 label; is that right?

5 A. No, I didn't see that.

6 Q. So you and your father-in-law, Mr. Jean-Marc Auriol,  
7 are the two inventors on the two United States patents; is  
8 that correct?

9 A. Yes.

10 MR. HOROWITZ: Your Honor, I just would ask that  
11 he take down the statement now.

12 THE COURT: If we're done questioning about  
13 that, yes.

14 BY MR. KELLEHER:

15 Q. Would it be fair to interpret your patents in the  
16 United States and in Europe as involving rifles into the  
17 walls of the tubes?

18 A. Yes, you can say that.

19 Q. And could you please look at JTX-35 in the binder.

20 THE COURT: Which binder?

21 MR. KELLEHER: Both actually, Your Honor, but  
22 we'll use mine now.

23 THE COURT: Okay.

24 MR. KELLEHER: This has already been admitted.  
25 May we put it up?

Bornes - cross

1 THE COURT: You may, if it's admitted.

2 THE WITNESS: Yes.

3 MR. KELLEHER: So, Your Honor --

4 BY MR. KELLEHER:

5 Q. I'm sorry, Mr. Bornes. This is the letter that you  
6 sent to Broetje in the year 2000; is that correct?

7 A. Yes.

8 Q. Okay. And you told Broetje that your patents  
9 involved rifles into the tube; correct?

10 A. Yes.

11 Q. And so they would be reasonable to accept that as  
12 true; is that correct?

13 A. Yes. If you mean that rifles are used as I told  
14 the -- just before.

15 Q. And rifles, say you take a long gun, rifle.

16 A. Yes.

17 Q. Yes? One of the things that helps the accuracy of  
18 the bullet is that there are grooves carved into the inside  
19 of the barrel; isn't that right?

20 A. Yes.

21 Q. Could you turn to 1357 in your book.

22 THE COURT: The one you gave him?

23 MR. KELLEHER: I'm sorry, your Honor?

24 THE COURT: Is it the one you gave him?

25 MR. KELLEHER: Yes. Correct.

Bornes - cross

1 THE COURT: The larger one.

2 THE WITNESS: Yes.

3 BY MR. KELLEHER:

4 Q. Mr. Bornes, is this a schematic for the two that if  
5 F2C2 used in its products in 2002?

6 A. Yes.

7 MR. KELLEHER: Your Honor, I would move the  
8 admission of DTX-1357.

9 MR. HOROWITZ: No objection, your Honor.

10 THE COURT: It's admitted.

11 (DTX-1357 was admitted into evidence.)

12 BY MR. KELLEHER:

13 Q. So, Mr. Bornes, this is the tube that F2C2 was using  
14 in 2002 for the products it delivered to my client; is that  
15 correct?

16 A. Yes. It's a drawing sent to people who are  
17 manufacturing the tube as the tube, you know, when we, the  
18 rifle, making the groove by ourselves. That I would say  
19 what is the drawing, which has been used to make them, but  
20 it's not exactly the shape. We've got to manufacture it  
21 because these products are extruded, and when you extrude  
22 plastic, the plastic has to be -- it's liquid. It's hot.  
23 When it becomes less warm, it retracts a little bit, so it's  
24 not exactly the shape we receive. But it was the drawing,  
25 which is used to manufacture them.

Bornes - cross

1 Q. Okay. And when you say "extruded," you're talking  
2 about pulling a tool through the inside of the tube?

3 A. No, no.

4 Q. Could you explain?

5 A. It was explained to me that when you are at the  
6 beginning, we have enough cassettes to build, so we use  
7 tubes which were only simple tubes. And then we made some  
8 tools to make the groove, which is going along the tube,  
9 make -- putting metal out and making the groove.

10 When we had enough, we could go to another type  
11 of manufacturing the tube, which was extrusion, but you need  
12 to order 2,000 metal long tubes and so on to be able to do  
13 that.

14 And in that case, you have plastic that is hot  
15 and liquid and you push the plastic through the tube, which  
16 has the shape, and then there is something which making it  
17 out of the machine while it's being pushed. And then the  
18 plastic is cooled down, and when it's cooled down, the  
19 plastic retracts.

20 So it's the shape that here is the one which is  
21 used to make the tool. But the rivets on the tube after was  
22 more or less looking like that, that's the shape.

23 Q. And so the, well, say the five grooves or points on  
24 the circle in this drawing, would you say those are the  
25 rifles you were referring to earlier?



Bornes - cross

1 A. It's a groove, yes.

2 Q. And when you do this extrusion process, you're  
3 talking about when you push a tool into the, into the --

4 A. It's plastic which is pushed --

5 Q. Right. When you push the plastic, the aim is to  
6 create those kind of rifles in the wall?

7 A. Yes.

8 Q. You indicated in your testimony yesterday that you  
9 and Mr. Auriol began trying to develop what eventually was  
10 patented in 1986 and filed a patent application in France in  
11 December 1988; is that correct?

12 A. Yes.

13 Q. Would Mr. Auriol be lying if he said you actually  
14 only spent a few months doing that development?

15 A. No, sir. I spent more than that. I spent two years  
16 and more.

17 Q. And -- but if he said it was just a few months, that  
18 would be wrong?

19 A. I think, yes.

20 Q. When you and Mr. Auriol began this development  
21 process, would it be fair to say that you had no prior  
22 experience working with feeding rivets through tubes?

23 A. Yes.

24 Q. Would you agree that putting a rivet in a tube is not  
25 very original?

Bornes - cross

1 A. No.

2 Q. You would not --

3 A. No, it's not original. Excuse me.

4 Q. Thank you.

5 And would you agree, you did not invent the  
6 concept of putting a rivet tube into a cassette?

7 A. No, I didn't. In fact, the -- what we developed and  
8 what we invented, it's a way to put very big amounts of  
9 rivet with tube. If you put a few of them, it's very easy  
10 to make them circulating the tube.

11 For instance, when you have a very big  
12 amount of rivet, that all of these rivets are taking all the  
13 space on the tube, which is impossible, because when you  
14 have the bigger amount, you find a lot of rivets in each  
15 position possible. So in that case, all the, the rivets  
16 will, if you have only one surface inside, shape, they  
17 would, they would use a rivet anywhere.

18 So in that case, the air is not about to  
19 blow out. When you want to make them running into the tube,  
20 you have to push all the rivets with the last one, and this  
21 you can -- you know, when you have enough rivets, you will  
22 make the tube increase, and you are, you have the chance and  
23 so on, but it won't work.

24 That's why we were using these grooves that  
25 have air going. You know, the rule has to be not where the

Bornes - cross

1 rivet could be to make sure that if it's open or not,  
2 there's a place where there's a place for the air to be all  
3 around the tube and to be able to make the rivet moving.

4 Q. The claims in your patents don't actually require a  
5 certain number of rivets to be used, do they?

6 A. I don't remember. I can't tell you. But it was, it  
7 has been done for that.

8 Q. But you did not invent the concept of using tubes  
9 filled with rivets in a cassette?

10 A. I don't think so.

11 Q. Could you please turn to PTX-610 in the binder I gave  
12 you.

13 A. This one here?

14 MR. KELLEHER: And, Your Honor, this is already  
15 in evidence. May I publish it?

16 THE COURT: You may.

17 MR. KELLEHER: If we could turn to page .6.

18 BY MR. KELLEHER:

19 Q. So we've looked at this document earlier on,  
20 Mr. Bornes. This document, among other things, shows the  
21 ownership percentage of the European patent; is that  
22 correct?

23 A. Yes. It's all the patents. We have to -- all the  
24 sales. That means the sales in Europe, sales all over the  
25 world. So this 15 percent of all the patents.

Bornes - cross

1 MR. KELLEHER: Jonathan, could we move up to the  
2 packages?

3 BY MR. KELLEHER:

4 Q. There's a company here, Ateliers de la haute Garonne  
5 Rivets.

6 Do you see that, the fourth item, which is said  
7 to have a 47.50 percent share?

8 A. Share?

9 Q. That's a different company from the company above it,  
10 Ateliers de la Haute-Garonne; is that correct?

11 A. This says no, no -- excuse me. This has nothing to  
12 do with shares.

13 Q. It's a different --

14 THE COURT: Don't say shares.

15 MR. KELLEHER: Yes, Your Honor.

16 BY MR. KELLEHER:

17 Q. Mr. Bornes, not say shares of the company, but say  
18 percentage ownership of the intellectual.

19 A. It was the percentage of varieties that F2C2 means to  
20 all this personal opinion.

21 Q. It says the undersigned parties and lists them are  
22 co-owners of the patents?

23 A. Yes.

24 Q. Do you see that?

25 A. Yes.

Bornes - cross

1 Q. According to the following terms.

2 A. Yes.

3 Q. And then it lists different percentages for the four  
4 entities, for you and Mr. Bornes and then the two entities?

5 A. Yes.

6 Q. And so Ateliers de la Haute-Garonne, who is the  
7 plaintiff here, has only a 2.5 percent share; isn't that  
8 correct?

9 A. Yes.

10 Q. And there's a separate company called Ateliers De La  
11 Haute-Garonne Rivets?

12 A. Yes.

13 Q. And that had a 47.50 percent share?

14 A. Yes.

15 Q. They're not a party to this case?

16 A. No, because the share of Ateliers De La Haute-Garonne  
17 Rivets has been transferred to Ateliers de la Haute-Garonne.

18 Q. Do you know if that document was produced to us in  
19 this litigation?

20 MR. HOROWITZ: Objection, Your Honor.

21 THE COURT: Sustained.

22 BY MR. KELLEHER:

23 Q. You are not a party to this case; is that correct?

24 A. Yes.

25 Q. Okay. And Mr. Auriol is not a party to this case; is

Bornes - cross

1       that correct?

2       A.       No.

3       Q.       And so for sales that would have been made when this  
4       contract is in effect, F2C2 would have to pay a 15 percent  
5       royalty; is that correct?

6       A.       Yes.

7       Q.       So that would be a 15 percent cost of sales to F2C2  
8       for any products that it sold to Broetje?

9               THE INTERPRETER: The witness is asking for the  
10       witness to be repeated slowly.

11       BY MR. KELLEHER:

12       Q.       I apologize. So that would be a 15 percent cost of  
13       sales by F2C2 for any sales that it made to Broetje?

14       A.       I didn't understand the term of cost in that. We  
15       have -- F2C2 us to pay 15 percent of all the sales to, with  
16       this percentage.

17       Q.       If I understood the testimony correctly, the very  
18       first sale of the invention was to British Aerospace or  
19       sometimes called BAE?

20       A.       Yes.

21       Q.       In the early nineties?

22       A.       Yes.

23       Q.       Approximately 1991?

24       A.       Yes.

25       Q.       So this was three years after you were able to file a

Bornes - cross

1 patent application?

2 A. Yes.

3 Q. You weren't able to sell any in between those three  
4 years?

5 A. No. That was the first one.

6 Q. And the British Aerospace project, that was a  
7 relatively secret military aircraft project; correct?

8 A. Yes.

9 Q. And the facility was not open to the public?

10 A. Yes.

11 Q. And the facility was not even opened to my client,  
12 Broetje?

13 A. I suppose it was like for me, yes.

14 Q. It was closed to you as well?

15 A. Yes.

16 Q. No one at British Aerospace could see what it was  
17 that you delivered; correct?

18 A. Correct.

19 Q. Do you know if my client ever even saw what you  
20 delivered?

21 A. Yes, because we studied system on their machine  
22 before.

23 Q. Mr. Bornes, could you turn to PTX-129?

24 A. (Witness complies.)

25 Q. Mr. Bornes, do you know what this is?

Bornes - cross

1 A. Yes. It's kind of a paper about the history of the  
2 cassettes.

3 Q. And it was prepared by Mr. Gerhard of F2C2?

4 A. Yes.

5 MR. KELLEHER: Your Honor, I offer this into  
6 evidence.

7 MR. HOROWITZ: Your Honor, may we approach?

8 THE COURT: Sure.

9 (Sidebar conference held.)

10 MR. HOROWITZ: I just wanted to bring the  
11 document. I apologize.

12 THE COURT: Right. Okay. So PTX-129.

13 MR. HOROWITZ: Right. My difficulty is this.

14 THE COURT: Speak up.

15 MR. HOROWITZ: I'm sorry. I'm worried with the  
16 jury.

17 THE COURT: They can't hear you.

18 MR. HOROWITZ: The difficulty is this. While  
19 this is a document that was produced in litigation, clearly  
20 to Broetje, it was a document that was prepared for purposes  
21 of the French litigation. It was prepared by this man,  
22 Mr. Gerhard, in 2010 and after Mr. Gerhard left the company  
23 and so it's difficult in a sense that I understand they want  
24 to cross-examine him with it, but to use it to offer it into  
25 evidence through Mr. Bornes, they cannot lay the appropriate



Bornes - cross

1 foundation because he doesn't have percipient knowledge of  
2 the document.

3 THE COURT: All right.

4 MR. KELLEHER: It was prepared. It is prepared  
5 by my party opponent. An interrogatory answer is prepared  
6 in litigation, too. That doesn't make it inadmissible.  
7 Mr. Bornes does know what this is. He has seen it before.  
8 I have seen it before. The mere fact he had left the  
9 company before it was made doesn't mean he doesn't know what  
10 it is and its contents. It's the history of the development  
11 of the cassette all the way back to the 1990s all the time  
12 up to where he left the company and the photographs of the  
13 cassettes he has been testifying about.

14 THE COURT: Anything?

15 MR. HOROWITZ: The difficulty is as to the  
16 accuracy and the veracity of it, he can't say because he  
17 didn't prepare it. It's not his document. It's difficult.  
18 I do think he can cross-examine him on it. But to offer it  
19 into evidence, he is not the appropriate sponsor with which  
20 to do that.

21 THE COURT: I think if you can lay the extra  
22 foundation, which I don't think you got to yet, that he has  
23 seen it before, I will overrule the objection. Feel free to  
24 make the objection again if you like. But if he makes the  
25 foundation, I will overrule it.

Bornes - cross

1 MR. HOROWITZ: Then I will probably not then.

2 THE COURT: Well, you have made it here, so.

3 MR. KELLEHER: Your Honor, as long as we're  
4 here.

5 THE COURT: Yes.

6 MR. KELLEHER: We have an exhibit in our list  
7 that is a translation to English of this document. I  
8 would, assuming this gets into evidence, I would offer the  
9 translation as well although probably use just the photographs.

10 THE COURT: Has the translation been provided?

11 MR. HOROWITZ: It's been provided.

12 MR. KELLEHER: I can give you a number.

13 MR. HOROWITZ: I know that. My question is  
14 there was some discussion about this this morning. Has it  
15 been certified?

16 MR. KELLEHER: It is certified.

17 MR. HOROWITZ: Then that is appropriate.

18 THE COURT: How much more cross do you think you  
19 have?

20 MR. KELLEHER: At least have an hour.

21 THE COURT: Okay. Well, let's see if this  
22 document comes into evidence, and then we'll take a break.

23 MR. KELLEHER: Okay.

24 THE COURT: Okay. Thanks.

25 (Sidebar conference ends.)

Bornes - cross

1 THE COURT: Thank you for your patience, ladies  
2 and gentlemen. You may continue.

3 BY MR. KELLEHER:

4 Q. So Mr. Bornes, this document, we're looking at  
5 PTX-129, you have seen this before?

6 A. Yes.

7 Q. When did you see it before?

8 A. I don't remember. It was after I left the company.

9 Q. Do you remember, Mr. Bornes -- I know it's been a few  
10 years but you and I have met before. I took your deposition  
11 in New York City about three years ago.

12 A. Yes.

13 Q. And did I show this document to you during that  
14 deposition?

15 A. I think so, but I'm not sure.

16 Q. Would you just turn to page PTX-129.3?

17 A. Yes.

18 Q. There is a photograph of a cassette here?

19 A. Yes.

20 Q. Is this the cassette or a similar cassette that was  
21 delivered to British Aerospace?

22 A. Yes.

23 Q. And just flipping through a few of the pages, do  
24 you recognize these photographs as being the AHG or F2C2  
25 cassette as it developed over time?

Bornes - cross

1 A. It's the first one we have had, yes.

2 Q. I apologize. Could you flip through a few pages, as  
3 many as you like?

4 A. Yes, I managed to while I was waiting.

5 Q. So these pictures show the development of the  
6 cassette over the years; is that correct?

7 A. Yes.

8 MR. KELLEHER: Your Honor, I would move the  
9 exhibit into evidence.

10 MR. HOROWITZ: Your Honor forgive me. I know it  
11 said I wouldn't do this, but I don't think that is an  
12 appropriate foundation.

13 THE COURT: I'm going to overrule the objection.  
14 The document is admitted.

15 (PTX-129 is admitted into evidence.)

16 THE COURT: Ladies and gentlemen of the jury,  
17 we're going to give you your morning break at this point.  
18 Of course, no talking about the case during the recess, and  
19 we'll get you back here about 15 minutes or so.

20 (Jury left courtroom.)

21 THE COURT: Feel free to step down, if you like.  
22 We had some issues that we didn't get to this  
23 morning. I'd like to take some of those up now, but anyone  
24 else is free to stay or leave.

25 MR. HOROWITZ: Your Honor, one housekeeping

Bornes - cross

1 issue. On my direct examination, I forgot to move into  
2 evidence, PTX-570, which is one of the cassettes.

3 MR. KELLEHER: No objection.

4 THE COURT: All right. Do it again when the  
5 jury is in. Maybe on your redirect.

6 MR. HOROWITZ: Okay.

7 THE COURT: And we'll make a record of it.

8 All right. So, first of all, did we resolve the  
9 one issue?

10 MR. CAHR: I made a proposal to them. I haven't  
11 had a chance to.

12 THE COURT: You all --

13 MR. CAHR: -- or maybe you have an answer. My  
14 proposal is that basically we agree that both sides will  
15 admit as exhibits the attachments and CVs from the expert  
16 reports without either party waiving any objections as to  
17 Daubert or anything like that. Just, that's fine. And then  
18 for the data compilation, sales summaries, we won't make  
19 them do the 15,000 documents or anything like that as long  
20 as they're able to get it in through a proper witness, but  
21 an expert is not. So Dominique Hage can testify about that,  
22 for example. Then that can come in without having to show  
23 us all the 15,000.

24 THE COURT: He testify that the 15,000 pages  
25 exist but we need not show.

Bornes - cross

1 MR. CAHR: Right. That this is the summary that  
2 was created by the company. This is a summary. All the  
3 typical things that would show it would be reflective of  
4 business records, but Hage would have to get it in.

5 THE COURT: Ms. Sharp.

6 MS. SHARP: Your Honor, there are two issues. I  
7 don't think that that is a resolution because it doesn't  
8 resolve the issues of whether the underlying documents are  
9 coming in. And this cuts both ways. It's not a question  
10 of relieving plaintiffs from putting in their underlying  
11 documents. Defendants is going to have the same problem, so  
12 whatever cuts one way cuts the other.

13 THE COURT: As I understand it, the proposal is  
14 everyone gets their exhibits to the expert report in as long  
15 as you at least have somebody from your company say there  
16 are underlying documents that provided the basis for the  
17 inputs I guess to these exhibits.

18 MS. SHARP: If that is the proposal.

19 THE COURT: That is what I understood.

20 Mr. Cahr, am I wrong?

21 MR. CAHR: That is what I'm proposing.

22 MS. SHARP: So the witness simply says the  
23 statement without having to be handed every one of the  
24 documents.

25 THE COURT: And without those documents even

Bornes - cross

1 being offered into evidence.

2 MR. CAHR: Right. Right. Just like I mean  
3 there is like each side has three or four summaries. Just  
4 to hand those summaries to the witness and say, yes, this is  
5 a summary that reflects this. They don't have to talk about  
6 the underlying document, every one of the underlying  
7 documents.

8 THE COURT: So is it Mr. Hage?

9 MR. CAHR: Yes, Mr. Hage.

10 THE COURT: Would be on the floor, the expert  
11 Ellis; correct?

12 MR. CAHR: Yes.

13 THE COURT: The proposal is you would show the  
14 exhibits of the Ellis report to Mr. Hage.

15 MR. CAHR: Well, these particular ones aren't  
16 exhibits to the expert report. That is the problem I have  
17 with the expert bringing them into evidence.

18 MS. SHARP: Your Honor.

19 MR. CAHR: There is two sets of those.

20 MS. SHARP: Your Honor, if I may.

21 I think where we were before the break, because  
22 the proposal doesn't resolve the underlying issue, if we  
23 might have a little bit more time this break and try to  
24 address it at lunch.

25 THE COURT: That's fine. And what about the

Bornes - cross

1 other issues?

2 MR. CAHR: There is one other -- there are two  
3 other quick issues. We have objections to the demonstratives  
4 that are being used by Mr. Ellis. We have objections based  
5 on -- I apologize. I may have grabbed the wrong thing.

6 We have objections based on Daubert to a number  
7 of these things, that they reflect incorrect calculations.

8 We have objections based on the fact that, for  
9 example, in the other claims on page 093 of this document,  
10 which I would be happy to show you, they include claims  
11 going back to 2003, but the other claims could not begin as  
12 a matter of law until the first one was sold in the United  
13 States which both parties agree was in 2004. This renders  
14 the entire thing inaccurate. So all of those, all of those  
15 claims are inaccurate.

16 There are a number of claims here which deal  
17 with loading stations and racks that are included as part  
18 of convoyed sales. But this includes ones that are sold  
19 entirely with projects with round tubes that are not  
20 accused.

21 So basically the problem is that the numbers  
22 themselves as reflected in the supplemental report that we  
23 received a few weeks ago, they're wrong. And the entire  
24 thing is poisoned by it because -- I mean these are clear  
25 factual errors that as a matter of law can't be cured. You



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1 can't get trade dress damages from before we were using the  
2 trade dress. You simply can't.

3 And you can't get loading -- convoyed sales on  
4 loading stations and distribution racks which were being  
5 sold entirely projects with unaccused products. So I mean  
6 basically -- and he should be excluded and his demonstrative  
7 should be excluded and his testimony should be excluded.

8 THE COURT: On these points, not on everything.

9 MR. CAHR: On everything, too. But I'm just  
10 sort of summarizing the highlights. This is something that  
11 if you want us to brief, we'll be happy to, but, and I think  
12 pretty clearly these are fatal problems with the report.

13 THE COURT: We're expecting Mr. Ellis to testify  
14 later today; correct?

15 MR. CAHR: We are.

16 THE COURT: All right. Well, we're hear from  
17 plaintiffs.

18 MS. SHARP: We vetted these issues last night,  
19 and the articulation that I'm hearing in the courtroom seems  
20 to pass what our discussion was last night. So, again, we  
21 might benefit from a specific head-to-head discussion again  
22 before Your Honor hears it.

23 This was the information that was disclosed in  
24 the supplemental reports that Your Honor directed. Round  
25 tubes were backed out at Your Honor's direction in the

Bornes - cross

1 limitation of what could be said about the round tubes and  
2 that only that they were not accused, not that they were not  
3 infringing. And the remainder of the objections go only to  
4 the weight of the evidence, not to the correctness or the  
5 sufficiency.

6 As to each of the specifics that were discussed  
7 last night and pointed out on the slides, we provided to  
8 Mr. Cahr information to confirm to him that round tubes were  
9 not included in the slide that he was complaining about.  
10 For example, PDTX-103.

11 And then on the starting date, this is the  
12 starting date for the other claims, and the period of  
13 damages essentially. There were some sales in the U.S. in  
14 2003 and that is what is included.

15 When the attachments go in with the expert  
16 reports, the calculations are done year by year. So if, on  
17 cross-examination or somehow there is some proof that 2003  
18 or some other year shouldn't have been included, then the  
19 jury would be able to discern the appropriate years and time  
20 periods and simply add those columns.

21 THE COURT: So Mr. Cahr argues first there were  
22 incorrect calculations. Do you know what incorrect  
23 calculations he is referring to or allegedly incorrect?

24 Ms. SHARP: Defendants disagree with, as is very  
25 common in these cases, with plaintiffs' damages report.

Bornes - cross

1 There is just a difference in how the two experts calculated  
2 it. Beyond that, I don't understand the objection.

3 THE COURT: And there is going to be evidence  
4 that you think will support a finding that there a sale,  
5 that the first sale was not as late as 2004 but was in fact  
6 2003?

7 MS. SHARP: There are underlying documents that  
8 show sales in 2003.

9 THE COURT: All right. And then on the convoyed  
10 sales being based on round tubes, your representation is  
11 there are no calculations that are providing an opinion that  
12 your client should get damages for any convoyed sales where  
13 the tubes that were part of that were round tubes?

14 MS. SHARP: That is correct. In the  
15 supplemental report, the round tube numbers were essentially  
16 backed out.

17 THE COURT: And whatever opinion or  
18 demonstrative is used in court will reflect that removal of  
19 the round tubes; correct?

20 MS. SHARP: That is correct.

21 THE COURT: Is there anything else you want to  
22 say?

23 MS. SHARP: No, Your Honor.

24 THE COURT: Mr. Cahr.

25 MR. CAHR: A couple of very important I think

Bornes - cross

1 things to note regarding what Ms. Sharp just said.

2 Yes, the round tube cassettes were excluded but  
3 the loading stations and distribution racks that were sold  
4 entirely with non-accused products are included as convoyed  
5 sales. That's just incorrect. And,

6 Second of all, the plaintiff has admitted  
7 that -- I don't think there is really any question about  
8 this, that our first use, our first use of the metal, the  
9 metal Broetje cassette was in 2004, and there are damages  
10 claims in 2003. And, moreover, the sales in 2004 were of  
11 cassettes with AHG loading stations and racks as we were  
12 just hearing from Mr. Bornes, because that was the reason  
13 why racks and loading stations from AHG were still delivered  
14 but Broetje cassettes were used. Those loading stations  
15 which were AHG loading stations and AHG racks are being  
16 concluded by Mr. Ellis as part of the damages base. That  
17 is simply wrong and it's fatal to the entirety of his  
18 opinion.

19 THE COURT: Why is this coming up just now?

20 MR. CAHR: Well, first of all, we just got the  
21 demonstrative last night. We got the expert report on --  
22 what date was that? The expert reports were just literally  
23 exchanged in the past few weeks.

24 THE COURT: Consistent with my ruling; correct?

25 MR. CAHR: Correct, consistent with your ruling.

Bornes - cross

1 THE COURT: What is it you propose now? That  
2 you brief a new round of Daubert motions -- Let me finish  
3 the question.

4 MR. CAHR: Oh, I'm sorry. My apologies, Your  
5 Honor.

6 THE COURT: And I decide it all before we get to  
7 Mr. Ellis's testimony later today?

8 MR. CAHR: I guess there is a couple of  
9 different ways this can be handled.

10 One, we could put off Mr. Ellis's testimony and  
11 in the meantime we could exchange short briefs on the topic.

12 Two, we could voir dire the witness briefly off  
13 time for both parties just to figure out what the story is  
14 on it.

15 Or I quite frankly think that unless there is a  
16 representation specifically that all the things I just said  
17 aren't true, I think that his report probably could be  
18 stricken on the spot. I mean I don't think there is really  
19 any -- I mean those fact are facts and nothing Ms. Sharp  
20 just said just now contradicted any of them.

21 THE COURT: All right. Let me get Ms. Sharp  
22 back briefly.

23 I understood the representations made last time  
24 you were up here to contradict the things Mr. Cahr has just  
25 told me. That the calculations are really just a matter of

Bornes - cross

1 opinion, that you believe there is evidence of a sale as  
2 early as 2003, and that you were backing out any sales  
3 related to even convoyed sales relating to use of round  
4 tubes. Did I understand you correctly?

5 MS. SHARP: Yes, Your Honor. The round tubes  
6 are backed out in the patent damage calculations because  
7 that is where the round tubes are relevant.

8 I believe they were also backed out of the  
9 entire cassette -- I have to confirm the extension of that  
10 preposition to the other damages, that they don't need to  
11 be backed out from the other damages. I just don't know  
12 the answer as I stand here. I believe we confirmed last  
13 night that they were backed out, but I don't want to  
14 misrepresent.

15 The expert reports, as Your Honor noted, were  
16 provided on the schedule the Court ordered. None of these  
17 topics were raised even at the most recent pretrial  
18 conference.

19 THE COURT: None of these objections?

20 MS. SHARP: These objections, yes.

21 THE COURT: All right. Well, I'm not going to  
22 order a new round of Daubert. I'm not going to strike  
23 Mr. Ellis. I do want to get further representation as to  
24 whether the convoyed sales related to round tubes were  
25 backed out from the other damages calculation. I don't know

Bornes - cross

1 that that will impact anything, but I would like to know  
2 that before we get to Mr. Ellis, and if there remains a  
3 dispute on that, we'll talk about it at that time.

4 MS. SHARP: Understood.

5 MR. CAHR: And just for clarity, that includes  
6 the representation that all convoyed sales of projects which  
7 included, say, all round tubes were not included in this  
8 calculation.

9 THE COURT: Ms. Sharp?

10 MR. CAHR: Loading stations and distribution  
11 racks.

12 MS. SHARP: I believe we provided all these  
13 representations last night. We'll cover them again and  
14 provide them again.

15 THE COURT: All right.

16 MS. SHARP: Both to Mr. Cahr and the Court.

17 THE COURT: You meet and confer on that and  
18 someone let me know before we get Mr. Ellis up here whether  
19 there's a remaining dispute about that that I need to  
20 resolve. Understood?

21 MS. SHARP: Understood.

22 MR. CAHR: Thank you very much, Your Honor.

23 THE COURT: You have issues with respect to one  
24 more issue?

25 MR. CAHR: Yes. Dr. Kytomaa.

Bornes - cross

1 MR. KELLEHER: Your Honor, I think this will be  
2 a short objection.

3 We received the slides of demonstratives for Dr.  
4 Kytomaa's examination last evening and we have a Rule  
5 37/Judge Farnan rule objection for a number of the slides  
6 that -- I could be incorrect. I don't recall ever having  
7 seen the substance of the opinions that these slides  
8 reflect. I understand you don't strike these things or bar  
9 them. I read them into the record and they proceed at their  
10 peril.

11 THE COURT: Right. If you want to put on the  
12 record certain testimony that you expected is going to be  
13 elicited with these slides as going beyond the expert  
14 report, go ahead and put that on the record.

15 MR. KELLEHER: Should I read the slide numbers  
16 now, Your Honor.

17 THE COURT: I think that would be an efficient  
18 way to do it. Yes.

19 MR. KELLEHER: PDTX-29, 33, 37, 39, 42, 48, 53,  
20 58, 60, 61, 62, 64, 65, 66, 67, 68 and 69. I think I forgot  
21 63.

22 THE COURT: Okay.

23 MR. KELLEHER: I apologize. Mr. Cahr reminds me  
24 there were a few Judge Farnan rule objections on Mr. Ellis'  
25 slides as well. PDTX-98, 116 and 117.



Bornes - cross

1 THE COURT: The testimony associated with that  
2 from Mr. Ellis, you're objecting to it as beyond the scope  
3 of his expert report?

4 MR. KELLEHER: Yes, Your Honor.

5 THE COURT: All right. I'm just going to note  
6 the objection, the prior ruling. If plaintiffs want to say  
7 anything or need any clarification on that?

8 MR. LINDVALL: No, Your Honor. We obviously  
9 disagree.

10 MS. SHARP: And we provided the references to  
11 paragraphs and pages last night.

12 THE COURT: Okay. Thank you. Any other issues  
13 we expect to come up today?

14 MR. CAHR: I think that's it, Your Honor.

15 THE COURT: All right. We'll give you a short  
16 break.

17 (Short recess taken.)

18 THE COURT: Anything else to discuss before we  
19 bring them in?

20 MR. KELLEHER: No, Your Honor.

21 THE COURT: No? Ms. Sharp, nothing else before  
22 we bring the jury back in?

23 MS. SHARP: I agree, Your Honor.

24 THE COURT: All right. Let's bring them in.

25 MR. LINDVALL: Do you want the witness back on

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1 the stand?

2 THE COURT: Yes. Thank you. Mr. Bornes?

3 (The jury entered the courtroom.)

4 THE COURT: Ladies and gentlemen, we are ready  
5 to continue.

6 Mr. Kelleher, you may proceed.

7 MR. KELLEHER: Thank you, Your Honor. A  
8 housekeeping matter first.

9 Earlier I showed the jury JTX-35. Thinking it  
10 was the, it had been admitted as PTX-167, JTX-35 is just the  
11 first page of that statement. Could I move JTX-35 into  
12 evidence?

13 MR. HOROWITZ: Your Honor, it's already in  
14 evidence as PTX-167, the full document. This is just an  
15 excerpt of that.

16 THE COURT: Right. It's just one page. Do you  
17 object to admitting one page?

18 MR. HOROWITZ: I don't object. It's  
19 unnecessary.

20 THE COURT: Probably unnecessary, but I will  
21 admit it. So the document is admitted.

22 MR. KELLEHER: Thank you very much, Your Honor.

23 (JTX-35 was admitted into evidence.)

24 BY MR. KELLEHER:

25 Q. Mr. Bornes, before we look at this Historique

Bornes - cross

1 cassette documents, you mentioned earlier that you believed  
2 that AHG had entered into a contract with Broetje in the  
3 mid-1990s; is that correct?

4 A. Yes.

5 Q. F2C2 never signed a contract like that with Broetje;  
6 isn't that right?

7 A. Yes, that's right, because we continue with where we  
8 are.

9 Q. Actually, F2C2 and Broetje operated on an order-by-  
10 order basis; isn't that correct?

11 A. No. The agreement was -- was working for us.

12 Q. F2C2 was not a party to the agreement?

13 A. Yes.

14 Q. Yes, it was not?

15 A. It's not part of the agreement. The fact that we  
16 go on working together doesn't mean that the agreement  
17 was -- in fact, in my mind, sure.

18 Q. Why don't we look at PTX-129.

19 MR. KELLEHER: And, your Honor, could I move the  
20 admission of Exhibit DTX-1944 as the certified translation  
21 of this document?

22 THE COURT: Any objection?

23 MR. HOROWITZ: No, Your Honor.

24 THE COURT: It's admitted.

25 MR. KELLEHER: Thank you.

Bornes - cross

1 (DTX-1944 Exhibit was admitted into evidence.)

2 BY MR. KELLEHER:

3 Q. Mr. Bornes, would you please look at 129.3.

4 A. Yes.

5 Q. And this is the cassette or the same type of cassette  
6 that was sold to British Aerospace in 1991?

7 A. Yes.

8 Q. Was that the only one of its kind that was sold?

9 A. I think so.

10 Q. And that was in England?

11 A. Yes. The one that was on the feeding system that we  
12 have sent to Broetje to be on the military site.

13 Q. So it was delivered to Germany and then ultimately  
14 ended up in England?

15 A. Yes.

16 Q. It never came to the United States?

17 A. No.

18 Q. Okay. Could we please turn to the next page, .4.

19 A. Yes.

20 Q. Okay. So this says 1991/1995. You can see the name  
21 of Dassault Aviation; is that correct?

22 A. Yes.

23 Q. Would it be correct to say that in the early 1990s,  
24 AHG entered into a relationship with the company Dassault to  
25 industrialize your product?

Bornes - cross

1 A. Yes, that's right.

2 Q. Okay. And would you say that after that  
3 industrialization was complete, it became easier to sell the  
4 product?

5 A. Yes.

6 Q. And it's true that AHG agreed to pay Dassault a  
7 royalty on every sale; is that correct?

8 A. Yes.

9 Q. Do you know for how long AHG and F2C2 paid that  
10 royalty?

11 A. I don't remember.

12 Q. Was it well into the 2000s?

13 A. I don't remember.

14 Q. Was that royalty still being paid when you left F2C2?

15 A. When I left, it was done for awhile, yes.

16 Q. Was it 15 percent?

17 A. No. I think it was ten percent.

18 Q. Okay. Could you turn to page .5. Okay. This rack  
19 that is shown here, is this a rack that AHG sold to Broetje  
20 and Broetje built into a system for delivery to Boeing  
21 Wichita?

22 A. I think so.

23 Q. Okay. So that's the mid-1990s? '96?

24 A. Yes.

25 Q. Okay. And the cassettes that were delivered by AHG

Bornes - cross

1 to this rack, they're made of plastic?

2 A. Yes.

3 Q. And you can actually see the inside of the tubes on  
4 this cassette in this photo?

5 A. Yes.

6 Q. Would you please turn to page .7. So just look at  
7 Generation 1. Now here's Generation 2. And this is still  
8 plastic; is that correct?

9 A. Yes.

10 Q. And would you turn forward to page .13. This is the  
11 year 2000 and this is Generation 3; is that right?

12 A. Yes.

13 Q. And the cassette is still made of plastic?

14 A. Yes.

15 Q. And would you turn forward to page .19.

16 A. Excuse me?

17 Q. .19.

18 A. 19?

19 Q. So now we're up to the year 2000 and this is marked  
20 as Generation 4; is that correct?

21 A. Yes.

22 Q. All right. And this cassette is still made of  
23 plastic?

24 A. Yes.

25 MR. KELLEHER: And, Your Honor, may I enter the

Bornes - cross

1 well?

2 THE COURT: You may.

3 BY MR. KELLEHER:

4 Q. And so what's shown in this paragraph is this  
5 cassette here (indicating), DTX-1223A?

6 A. Yes.

7 Q. Which has these, these number dials on the front; is  
8 that right?

9 A. Yes.

10 Q. And it has a colored tape around the coils?

11 A. Yes.

12 Q. And it has AHG and F2C2's name on it?

13 A. Yes.

14 Q. And it has this little string to hold the cap when it  
15 comes off?

16 A. Yes.

17 Q. This cap was taken off when you are loading rivets;  
18 is that right?

19 A. That's right.

20 Q. And then after they're all loaded, it's put back on?

21 A. Yes.

22 Q. And this is to make sure it does not fall off?

23 A. Yes.

24 Q. And could you turn to page 21.

25 A. Yes.

Bornes - cross

1 Q. So this says 2003, Cassettes Weforma.

2 Do you see that?

3 A. Yes.

4 Q. This was never really widely sold, was it?

5 THE INTERPRETER: He wants to rehear the  
6 question.

7 BY MR. KELLEHER:

8 Q. Sorry. This particular cassette was never widely  
9 sold?

10 A. No. We just manufactured ten of them. It was  
11 another company that asked us to work on this system just  
12 for them, so we develop it and then we sell them ten  
13 cassettes.

14 Q. And this one is still plastic?

15 A. Yes.

16 Q. Would you flip forward to page 24. So now we come go  
17 to the year 2005.

18 A. Yes.

19 Q. This is Generation 5 of the cassette?

20 A. Yes.

21 Q. And this one is aluminum on five sides; is that  
22 correct?

23 A. Yes.

24 Q. When was the first time this thing was sold in Europe  
25 after this was developed in 2005?



Bornes - cross

1 A. I don't remember. Probably in 2005, but I don't  
2 remember exactly.

3 Q. When is the first time it was sold in the United  
4 States after it was developed in 2005?

5 A. I don't...

6 Q. Would you please turn to page 30, Mr. Bornes.

7 So, Mr. Bornes, this says 2009/2010, Generation  
8 5B.

9 Do you see that?

10 A. Yes.

11 Q. And looking at this photograph, I now see that there  
12 are blue stripes or piping on the side of the cassette; is  
13 that correct?

14 A. I -- you see that -- it's painted? It's painted on  
15 the cassette?

16 Q. Yes. Do you see a blue stripe on the wall of the  
17 cassette?

18 A. Oh, okay. Yes. Yes.

19 Q. Okay. Are you familiar with this new variety of the  
20 cassette?

21 A. Not completely.

22 Q. Have you ever seen it before?

23 A. No.

24 Q. Okay. Do you know if Mr. Hage at F2C2 would know  
25 about this?

Bornes - cross

1 A. Yes.

2 Q. We'll ask him.

3 A. Okay.

4 Q. Mr. Bornes, when you discovered that Broetje was now  
5 selling its own cassette in Germany and you looked at it,  
6 would it be fair to say that it did not have any of those  
7 numerical counters on the front?

8 A. Yes.

9 Q. And would it be fair to say that it did not have any  
10 colored tape?

11 A. Yes.

12 Q. And would it be fair to say that it did not have that  
13 string in the back for holding the cap?

14 A. Excuse me? Yes. Yes.

15 Q. And would it be fair to say that it did not have the  
16 name F2C2 or AHG on it?

17 A. Yes.

18 Q. And would it be fair to say that it had the Broetje  
19 name on it?

20 A. Yes. But you know that doesn't mean that they are  
21 not looking alike. There are some small, small difference.

22 Q. Mr. Bornes, would you turn to Exhibit 10, DTX-1037.

23 Do you recognize this document?

24 A. Yes.

25 Q. Would you look on page 18.

Bornes - cross

1 A. Yes.

2 Q. Is that your signature?

3 A. Yes.

4 Q. Okay. And are the words, I declare, I declare under  
5 the penalty of perjury under the laws of the United States  
6 of America that the foregoing is true and correct?

7 A. Yes.

8 Q. And is the title of this document on the front page,  
9 Response of Atelier de la Haute-Garonne to notice of  
10 investigation and verified complaints of All Fast Fastening  
11 Systems and affirmative defenses filed in the United States  
12 International Trade Commission?"

13 A. Yes.

14 Q. Do you remember this lawsuit?

15 A. Yes.

16 Q. Do you remember that AHG was accused of trademark  
17 infringement by a company called Allfast?

18 A. Yes.

19 Q. And that was, they accused you have importing rivets  
20 that infringed their trademarks?

21 A. Yes.

22 Q. And you swore under oath that the contents of this  
23 document are true; is that correct?

24 A. Yes.

25 MR. KELLEHER: Your Honor, could I move into

Bornes - cross

1 evidence DTX-1037?

2 MR. HOROWITZ: Your Honor, I would object to its  
3 admission in evidence.

4 THE COURT: On what basis?

5 MR. HOROWITZ: Hearsay.

6 THE COURT: Mr. Kelleher?

7 MR. KELLEHER: It's the sworn statement of the  
8 witness.

9 THE COURT: It's written by counsel, but the  
10 witness has sworn that it is correct; right?

11 MR. KELLEHER: Yes, Your Honor, and at the time,  
12 he was an officer of the company.

13 THE COURT: Overruled. It's in. The document  
14 is admitted.

15 (DTX-1037 was admitted into evidence.)

16 BY MR. KELLEHER:

17 Q. Mr. Bornes, would you please turn to page 15. So  
18 there's a paragraph 83.

19 It says, starting on the third line at the  
20 end, all such certificates of conformance and packing slips  
21 prominently and clearly displayed AHG's company name, logo,  
22 and part number. Such information had the effect of  
23 identifying AHG as the source of rivets that were included  
24 in the shipment of which each such certificate of  
25 conformance and/or packing slip were a part. The size and

Bornes - cross

1 prominence of the text used for the terms, and so forth, was  
2 less than that used for AHG's company logo.

3 Do you see that?

4 A. Yes, I see it.

5 Q. And the purpose of this was to say that because the  
6 company logo were accompanying your rivets, that would  
7 prevent the possibility of confusion?

8 A. In fact, it was not -- it was some, some later, you  
9 said later?

10 Q. I will ask the question again: The purpose of this  
11 was to say that customers were not confused because AHG's  
12 logo was there? Yes?

13 A. Yes.

14 Q. Mr. Bornes, on the AHG cassette, is there a purpose  
15 to the clear lid?

16 A. Yes. We can, we can look to the tubing with the  
17 cover, through the cover.

18 Q. Would you please look to PTX-206.

19 A. Yes.

20 Q. Do you recognize this as an F2C2 advertisement?

21 A. Yes.

22 MR. KELLEHER: Your Honor, I would move the  
23 admission of PTX-206.

24 MR. HOROWITZ: No objection, Your Honor.

25 THE COURT: It's admitted.

Bornes - cross

1 (PTX-206 was admitted into evidence.)

2 BY MR. KELLEHER:

3 Q. So, Mr. Bornes, there's a paragraph that begins, a  
4 translucent lid.

5 A. Yes.

6 Q. It says, a translucent lid allowing to visually check  
7 the fasteners during the loading process and during feeding  
8 process.

9 Do you see that?

10 A. Yes.

11 Q. Okay. Would it be fair to say that you advertised  
12 the benefit of a clear top to the cassette?

13 A. Yes.

14 Q. All right. Is there a purpose to having a handle on  
15 the cassette?

16 A. Yes, sure.

17 Q. What is that?

18 A. It's to carry it.

19 Q. Is it also to slide the cassette in and out of the  
20 rack?

21 A. Also, yes.

22 Q. And if the handle were on top of the cassette, would  
23 that interfere with the use of the cassette?

24 A. Yes.

25 Q. If the handle were off center to one of the sides,

Bornes - cross

1 would that interfere with the use of the cassette?

2 A. Not sure. Could be working. It depends on the size  
3 and what the artist placed, because when you take the  
4 cassette, you slide it on the rack, as you said. You have  
5 the handle on one end and you carry the cassette with the  
6 other one. And the, if it was on the side, it should work  
7 the same.

8 Q. But if you were carrying it like a suitcase, it would  
9 no longer be the center of gravity; isn't that right?

10 A. You know the outlets are the same, the same weight.  
11 So it could be, depending on weight and so on. I'm not  
12 100 percent sure.

13 Q. The reason that F2C2 began dealing with the company  
14 Gemcor was because not enough business was being received  
15 from Broetje; is that correct?

16 A. You know, when you have a company, part of your job  
17 is to make sure that you increase yourself in any case.

18 Q. Would it be fair to say that Broetje was angry that  
19 F2C2 began dealing with Gemcor because during the course of  
20 the relationship with Broetje, there had been a number of  
21 suggestions by my client to make the system better?

22 A. Yes. Because as we said before, you buy system from  
23 us and you sell them to your customer, and your customers  
24 tell you what feedback they have. So you have to tell the  
25 customer, if you want to make some change on the cassette

Bornes - cross

1 because of the needs of the customer, we need you to tell us  
2 what was, what they want. Sure.

3 Q. Would it be fair to say that you actually offered to  
4 compensate my client for the fact that you had begun selling  
5 to Gemcor?

6 (Translator and witness confer.)

7 A. I don't think so.

8 Q. Did you ever tell Mr. Maylander at my client that you  
9 would be willing to pay a percentage of the revenue you were  
10 receiving from Gemcor to compensate Broetje for the fact  
11 that you were now selling to them?

12 A. To give money to Broetje for that?

13 Q. Yes.

14 A. I'm not familiar with that. What I surely did at  
15 that time, because Broetje buy me a lot of machine, they pay  
16 less than what Gemcor was to pay me because we begin to go  
17 work with them. That's true. But giving money to Broetje,  
18 I don't know that.

19 Q. After F2C2 and Broetje stopped doing business  
20 together, F2C2 cassettes and other products were still  
21 available to United States customers, right? Through  
22 Gemcor?

23 A. Yes.

24 Q. Have you visited the Boeing facility at Long Beach?

25 A. Yes.



Bornes - cross

1 Q. And do you know a gentleman named Michael Lawrence?

2 A. Yes.

3 Q. How do you know him?

4 A. Excuse me?

5 Q. How do you know him?

6 A. Because he was working, I think it was not Boeing but  
7 he was working for Boeing when we install the machine.

8 Q. And would you consider him to be a person  
9 knowledgeable concerning rivet bead systems?

10 A. Yes.

11 Q. So I understand that Broetje contacted AHG in  
12 approximately 1994 about doing this project for Boeing  
13 Wichita; is that correct?

14 A. Yes.

15 Q. When you delivered those cassettes to Broetje for  
16 that project, was that only the second time that AHG had  
17 sold its cassettes?

18 A. Can?

19 Q. Yes. The first sale was to British Aerospace about  
20 1991.

21 A. Yes.

22 Q. Then in 1994, Broetje contacted you about another  
23 purchase.

24 A. Yes.

25 Q. This is for Boeing Wichita?

Bornes - cross

1 A. Yes.

2 Q. Was that the second sale?

3 A. From us?

4 Q. Yes.

5 A. No, I think we have sold some machine to Dassault  
6 before.

7 Q. To Dassault. That's right. Do you know how many to  
8 Dassault?

9 A. Maybe one. No. Yes. Yes. At that time, one.

10 Q. So then was the sale to Broetje for Boeing Wichita  
11 the third sale?

12 A. With Broetje, yes.

13 Q. What about anyone else? Any other customers?

14 A. At that time, we just sell to British Aerospace and  
15 to Dassault, yes.

16 Q. So the sale for Boeing Wichita would have been the  
17 third sale of your invention?

18 A. Yes. Yes. I understood first. I'm sorry. It's  
19 confusing.

20 Q. Could you please look at PTX-188?

21 MR. KELLEHER: Which, Your Honor, my notes say  
22 is already in evidence.

23 MR. HOROWITZ: I'm not sure that is correct.

24 THE COURT: You do believe it is or you don't?

25 MR. HOROWITZ: I don't believe it is. I can

Bornes - cross

1 check.

2 THE COURT: You don't think it is?

3 MR. KELLEHER: I'll merely ask the question. We  
4 can get it in later if it's not already.

5 BY MR. KELLEHER:

6 Q. The magnetic code reader.

7 A. Yes.

8 MR. KELLEHER: Your Honor, may I enter the well?

9 THE COURT: Yes.

10 BY MR. KELLEHER:

11 Q. The magnetic code reader that is at the back of the  
12 cassette?

13 A. Yes.

14 Q. This allows the rack to have information about the  
15 rivets that are inside; is that right?

16 A. Yes.

17 Q. Was it at Broetje's request that this was added to  
18 the product?

19 A. This one, no. There are others. At beginning, we  
20 have one which was the read only system, and this one we  
21 have basic because we want to know exactly what was inside  
22 the cassette. So each time we put a rivet out, we can tell  
23 the machine how it works. So this one no, but the first one  
24 yes.

25 Q. The first one yes?

Bornes - cross

1 A. Yes.

2 Q. Is that was for Boeing Wichita?

3 A. Yes, just as that because previously we have the  
4 counter on the back of the cassette for the same function.  
5 And they say that this function, they prefer to buy this  
6 only with the contact label.

7 Q. Mr. Bornes, could you look to Exhibit 252?

8 THE COURT: PTX-252?

9 MR. KELLEHER: Correct, Your Honor.

10 BY THE WITNESS:

11 A. Yes.

12 Q. Do you recognize this as a letter or a fax from  
13 Broetje in 1997 to you?

14 A. Yes. I don't know if I receive it because there is  
15 nothing saying that, but it's a kind of fax I could have  
16 receive at that time, yes.

17 MR. KELLEHER: Your Honor, I would offer this  
18 into evidence as unobjected to on the exhibit list.

19 MR. HOROWITZ: Well, in that case, no objection,  
20 Your Honor.

21 THE COURT: Okay. It's admitted.

22 (PTX-252 is admitted into evidence.)

23 BY MR. KELLEHER:

24 Q. Could you turn forward to page 15?

25 A. (Witness complies.)

Bornes - cross

1 Q. Why don't we make that 14, actually.

2 A. Yes.

3 Q. And it says: Dear Mr. Bornes, attached the corrected  
4 page. Kind regards, someone at Broetje. Annex: Circuit  
5 diagram.

6 And over the next few pages, are those circuit  
7 diagrams that my client sent to you for the use of the code  
8 reader?

9 A. Excuse me. I didn't catch the question.

10 Q. Are these circuit diagrams ones that were sent by my  
11 client to you?

12 A. Yes.

13 Q. To make the code reader work properly?

14 A. Yes.

15 Q. I wonder, did my client also suggest putting more  
16 light sensors in the rack to better understand what is going  
17 on in the cassette in the rack?

18 A. You know, I don't remember exactly what. And I don't  
19 know what you are asking. We have a lot of things that  
20 are on the rack that would provide it, and perhaps you have  
21 asked for some more. I don't recall exactly. But like  
22 that, I can't tell you because a lot of things are on this  
23 machine.

24 Q. Do you remember that my client suggested adding a  
25 throttle to the machine to control the air pressure in the

Bornes - cross

1 tubes?

2 A. Yeah. I don't remember if it was even -- it could  
3 be. I don't remember when we spoke about some type of  
4 problem. This could have been. I don't recall exactly.  
5 But you know even though is if you speak about some troubles  
6 and you speak suggestions.

7 I also, when I was working for Broetje, when we  
8 install your machines, sometimes you know I have to wait  
9 eight hours to be able to work for two hours because Broetje  
10 have some problems to resolve, and sometime I give them  
11 some ideas on the way to do it. I never said that because  
12 of that, it was proprietary of the machine. So, yes, we  
13 cannot have some discussion with people from Broetje about  
14 the product, but in fact we always make, all has to be done  
15 on the machine to make them work. So even if you give some  
16 suggestion, we were not involved on the design on the way  
17 the machine was done.

18 Q. Could you turn to Exhibit No. 43, please? JTX-43.

19 A. (Witness complies.)

20 Q. Do you recognize this as an order from my client to  
21 F2C2?

22 A. Yes.

23 MR. KELLEHER: Your Honor, I would offer the  
24 admission of Exhibit JTX-43 as unobjected to.

25 MR. HOROWITZ: No objection, Your Honor.

Bornes - cross

1 THE COURT: It's admitted.

2 (JTX-43 is admitted into evidence.)

3 BY MR. KELLEHER:

4 Q. So this is an order from Broetje to AHG for a system  
5 to be installed at a Shorts Brothers in Ireland; is that  
6 correct?

7 A. Yes.

8 Q. And I see Paragraph No. 1 says there is a rack.  
9 Paragraph No. 2 says there is cassettes?

10 A. Yes.

11 Q. Do you see that?

12 Would you turn to the next page?

13 A. (Witness complies.)

14 Q. About halfway down the page, you see circuit diagram?

15 A. Yes.

16 Q. And it says: Will be prepared by Broetje Automation.  
17 Do you see that?

18 A. Yes.

19 Q. And do you see: Software will be prepared by Broetje  
20 Automation?

21 A. Yes, this was the order from Broetje. They want to  
22 be able to drive the system, by their own system. So we  
23 give them the schematics so they will be able to make it by  
24 themselves. And after awhile, we decided that it was not  
25 working well, so we have put on the system our own system to

Bornes - cross

1 drive it because we feel it was better with that. Yes.

2 Q. Mr. Bornes, you indicated that after you received the  
3 e-mail from Mr. Maylander at my client complaining about the  
4 relationship, the new relationship with Gemcor, that you  
5 began to receive a lot of fault reports. Do you remember  
6 that?

7 A. Yes.

8 Q. Did you ever receive any fault reports before that?

9 A. Yes, sure. Far less.

10 Q. Far less?

11 A. Yes. The amount was increasing.

12 Q. Did you ever receive a letter from Mr. Neugebauer  
13 at my client indicating that Broetje was considering other  
14 options for the rivet feed system because of the technical  
15 problems that we had had with you?

16 A. Yes.

17 MR. HOROWITZ: Objection, Your Honor. I believe  
18 I know which exhibit this is going to, and we should  
19 approach on that exhibit.

20 THE COURT: All right. We'll have a discussion  
21 at sidebar.

22 (Sidebar conference held.)

23 MR. HOROWITZ: I assume this is going to be --

24 THE COURT: Did you want to talk to him? You  
25 guys can go talk among yourselves.



Bornes - cross

1 (Attorneys confer.)

2 THE COURT: All right. What is the issue?

3 MR. HOROWITZ: What this is, is there is an  
4 exhibit.

5 THE COURT: Speak up.

6 MR. HOROWITZ: DTX-1018. It's a letter that he,  
7 counsel, if I'm not misrepresenting, correct me, not offered  
8 into evidence, but he wants to examine on the content of the  
9 letter which is why I stood up because I recognized. This  
10 is a letter we did object to on the objection list, the  
11 pretrial order.

12 As you can see, it's unsigned. There is no  
13 evidence that it was ever sent or received by Mr. Bornes.  
14 We asked the 30(b)(6) witness at his deposition because  
15 obviously he was focused on this. They couldn't verify that  
16 it was sent or received by Mr. Bornes and therefore not only  
17 should it not come into evidence but I think it is very  
18 highly prejudicial, 401, 402. And he should not be allowed  
19 to cross-examine on the content because there is no evidence  
20 to it's authentication.

21 THE COURT: All right. Mr. Kelleher.

22 MR. KELLEHER: Your Honor, I'm not planning on  
23 getting this exhibit in with this witness. I'm going to  
24 get it in through the author, Mr. Neugebauer, who will be  
25 testifying later who will testify he did in fact send it. I

Bornes - cross

1 asked him whether or not he ever received a letter from any  
2 client indicating they were considering changing rivet feed  
3 suppliers because of technical problems. He already  
4 answered yes to that question.

5 My only follow-up was going to be did he receive  
6 it before he received the later letter from Mr. Neugebauer  
7 saying because of Gemcor that they might be changing  
8 suppliers.

9 THE COURT: I understand you are not going to  
10 try to move the letter in through him. Are you showing it  
11 to him?

12 MR. KELLEHER: No, Your Honor.

13 THE COURT: Is it in the binder?

14 MR. KELLEHER: I don't know.

15 MR. HOROWITZ: It is in the binder.

16 THE COURT: I mean you are not planning to have  
17 him look at it.

18 MR. KELLEHER: Yes.

19 THE COURT: And you are representing  
20 Mr. Neugebauer will be here live to testify?

21 MR. KELLEHER: Yes, he was here yesterday.

22 THE COURT: And he said he wrote this letter and  
23 mailed it to Mr. Bornes?

24 MR. KELLEHER: Yes.

25 THE COURT: All right.

Bornes - cross

1 MR. KELLEHER: And for the 30(b)(6) issue, the  
2 letter itself was not a 30(b)(6) topic, and whether or not  
3 my witness would have been able to say whether a thousand  
4 different documents were sent and received, 30(b)(6)  
5 depositions are not memory tests like the case law says.

6 THE COURT: It seems with that representation  
7 that it's a fair topic for cross-examination, but maybe I'm  
8 missing something.

9 MR. HOROWITZ: Well, the topic of  
10 cross-examination of Mr. Neugebauer or whether or not he  
11 sent an unsigned letter, of course, we can cross-examine on  
12 that, I agree, but I don't think that it's fair to use with  
13 this witness in front of the jury because it's prejudicial.

14 THE COURT: Right. Did I misunderstand? You  
15 are not going to use the letter; correct?

16 MR. KELLEHER: Correct.

17 THE COURT: So, what, you have one more  
18 question?

19 MR. KELLEHER: My one more question is: Did  
20 you receive that letter before you received the later letter  
21 from Mr. Neugebauer?

22 THE COURT: Did you receive a letter before?

23 MR. KELLEHER: Yes.

24 THE COURT: You are not going to have him look  
25 at the letter?

Bornes - cross

1 MR. KELLEHER: He already said yes in response  
2 to my question.

3 MR. HOROWITZ: In response to that, the man said  
4 yes to 98 percent of the questions asked.

5 THE COURT: All right.

6 MR. HOROWITZ: But if there is one additional  
7 question ...

8 THE COURT: To the extent there is an objection  
9 it's overruled. We'll have the one more question and we'll  
10 move on.

11 MR. KELLEHER: Thank you, Your Honor.

12 (Sidebar conference ends.)

13 THE COURT: You may continue.

14 BY MR. KELLEHER:

15 Q. Mr. Bornes, that letter concerning Mr. Broetje  
16 considering a new rivet bead supplier, did you receive that  
17 letter before you received the letter we looked at earlier  
18 today, the e-mail from Mr. Neugebauer earlier today --

19 A. Yes.

20 Q. -- that Gemcor was considering a new supplier? I  
21 think yes was your answer.

22 A. Okay.

23 THE COURT: Was yes the answer?

24 MR. HOROWITZ: Your Honor, just to be sure.

25 THE TRANSLATOR: Repeat the question.

Bornes - cross

1 (Translator and witness confer.)

2 THE WITNESS: It's hard to understand you, sir.

3 THE COURT: Let's ask the question again.

4 MR. KELLEHER: I will try one more time.

5 THE COURT: Is there an objection?

6 MR. HOROWITZ: There is an objection. I don't  
7 want to approach again but I have a solution that I would  
8 propose that would be more fair and practical to the witness  
9 on this question.

10 THE COURT: You have an objection to the  
11 question that was asked?

12 MR. HOROWITZ: Yes. Yes, I do.

13 THE COURT: All right. I'll see you at sidebar.

14 (Sidebar conference held.)

15 THE COURT: All right. What is the issue?

16 MR. HOROWITZ: My proposed solution is he is  
17 asking him about a specific letter. He characterized it in  
18 his question as a specific letter. I think the witness  
19 should, without showing it to the jury, should see the  
20 letter that he is talking about as the predicate for his  
21 question and answer the question in that context because I  
22 think it's unfair for the witness, in the abstract,  
23 especially with the translation issues, to not have the  
24 letter in front of him as he is asking about a specific  
25 letter.

Bornes - cross

1 THE COURT: What is your position?

2 MR. KELLEHER: I think that is for redirect.

3 THE COURT: You want a general answer to "did he  
4 receive a letter before he got the e-mail;" right?

5 MR. KELLEHER: Yes.

6 THE COURT: All right. I'm going to allow him  
7 to get an answer to that question. You can -- I take it you  
8 are not going to object if he wants to show him the specific  
9 letter on redirect.

10 MR. KELLEHER: I don't.

11 THE COURT: Okay.

12 MR. HOROWITZ: One last thing. I apologize but  
13 that wasn't the question that was just asked. He is  
14 referring to the letter as opposed to the general question.

15 THE COURT: I do think "the" and "a" even in  
16 English can get a little confused at times, and we also had  
17 a break in between the first question and the second  
18 question. So you are going to ask essentially, I don't know  
19 what words you'll use, but did you receive a letter from  
20 Mr. Neugebauer before you got the e-mail that we have  
21 already seen; correct?

22 MR. KELLEHER: Yes.

23 THE COURT: Okay. Thank you.

24 (Sidebar conference ends.)

25

Bornes - redirect

1 Q. Mr. Bornes, I'm going to try one more time. So did  
2 you receive a letter from Mr. Neugebauer at Broetje saying  
3 that Broetje was considering using a new supplier because of  
4 the technical, because of technical problems before you  
5 received the letter or e-mail from Mr. Neugebauer saying  
6 Gemcore was the problem?

7 A. Yes.

8 MR. KELLEHER: I don't have any more problems.

9 THE COURT: Thank you. Redirect.

10 MR. HOROWITZ: Just a few questions, Mr. Bornes.

11 Before I forget, Your Honor, I forgot to move in  
12 PTX-570, and at this time I would offer into evidence  
13 PTX-570, which is one of the cassettes that we used with the  
14 jury.

15 MR. KELLEHER: No objection.

16 THE COURT: All right. It's admitted. Thank  
17 you.

18 (PTX-570 was admitted into evidence.)

19 MR. HOROWITZ: If we could pull up DTX-1944 that  
20 you were asked questions about. It's in the back of the  
21 binder that plaintiffs' counsel used with you.

22 THE COURT: Identified as PTX-129. Same  
23 document; is that correct?

24 MR. HOROWITZ: It is PTX-129. I believe he also  
25 offered the English translation, DTX-1944.

Bornes - redirect

1 MR. KELLEHER: I did. You'll notice, Your  
2 Honor, DTX-1944 contains the marking. PTX-129, the  
3 translator left it out.

4 THE COURT: Thank you for that clarification.

5 MR. HOROWITZ: I'm going to use the English  
6 translation for everybody's benefit --

7 THE COURT: Fine.

8 MR. HOROWITZ: -- including mine.

9 REDIRECT EXAMINATION

10 BY MR. HOROWITZ:

11 Q. If we could turn to a page you were asked about,  
12 DTX-1944.0024.

13 Do you see that?

14 THE COURT: What was that page again?

15 MR. HOROWITZ: It's -- this is it. PTX-19.24,  
16 or DTX-1944.024.

17 THE WITNESS: Yes.

18 BY MR. HOROWITZ:

19 Q. Are you with me? Looking at the fourth bullet point  
20 down, what does it say with regard to --

21 A. Oh, excuse me. I have the only one in French.

22 Q. Okay. It's at the back. It's at the back of the  
23 binder. The very back.

24 A. Oh. I'm sorry. Okay. Excuse me. 24. Okay.

25 Q. You were asked about this document; right?



Bornes - redirect

1 A. Yes.

2 Q. Okay. But you weren't directed to this bullet point,  
3 were you?

4 A. No.

5 Q. If you take a look at the first sentence, what does  
6 the first sentence say about use of the aluminum envelope or  
7 the three-sided aluminum cassette?

8 A. It said, recommissioning of the rigid aluminum  
9 envelope of the 1990s. The envelope is embellished with a  
10 polycarbonate window on its side so that the rivets can be  
11 seen when the cassette is in a distribution rack or filling  
12 machine.

13 Q. So that's the aluminum, the aluminum cassette that  
14 you were using in the 1990s before you went to plastic?

15 A. Yes.

16 Q. And were you going back to that look and feel that  
17 you had before with the aluminum?

18 A. Yes.

19 Q. Okay. If you could turn, just going to do a couple  
20 things. PTX-206.1.

21 A. Yes.

22 Q. Just waiting for -- 206, PTX-206. You were asked  
23 about this advertisement.

24 Do you see that?

25 A. Yes.

Bornes - redirect

1 Q. All right. And if you go to the first sentence where  
2 it says, a cassette consists of, what's the first thing that  
3 it says underneath, a cassette consists of?

4 A. It's a coil of patented tube which allows the free  
5 flow of fasteners.

6 Q. A coil of patented tube which allows the free flow of  
7 fasteners. Was that your patent on the tube?

8 A. Yes.

9 Q. And this was actually put in advertisements that were  
10 sent out about your system?

11 A. Yes.

12 Q. You were asked a little bit about the letter that  
13 your lawyer sent to Broetje in 2005, your French lawyers,  
14 when you found out about what Broetje was doing; is that  
15 right?

16 A. Yes.

17 Q. And they were asking you questions about whether or  
18 not you investigated in the United States and, you know, why  
19 couldn't you have figured out before 2007 what was going on  
20 in the United States.

21 Do you recall that?

22 A. Yes.

23 Q. When you sent the letter to -- your lawyers sent the  
24 letter to Broetje in 2005, did Broetje write you back and  
25 say, oh, by the way, here's a list of the countries we're

Bornes - redirect

1 doing this in?

2 A. No.

3 Q. Did they volunteer to you that they were doing this  
4 in the United States?

5 A. Yes.

6 Q. Did they tell you?

7 A. No.

8 Q. Did they tell you?

9 A. Excuse me. No, they didn't. They didn't tell me.

10 Q. Did they leave it to you to find out on your own?

11 A. Yes.

12 Q. Did they ever tell you what they were doing with  
13 these cassettes?

14 A. No.

15 MR. HOROWITZ: No further questions, Your Honor.

16 THE COURT: All right. Mr. Bornes, you may step  
17 down. Thank you very much.

18 THE WITNESS: Thank you.

19 (Witness excused.)

20 THE COURT: Who is the next witness going to be?

21 MR. LINDVALL: Your Honor, we have very video  
22 clips.

23 THE COURT: How long is the first one?

24 MR. HOROWITZ: Your Honor, the total for the  
25 first one is 21 minutes.

Bornes - redirect

1 THE COURT: Okay. We'll play the 21 minutes and  
2 then we'll have our lunch break.

3 MR. LINDVALL: A brief introduction?

4 THE COURT: Yes, you may. Of course.

5 MR. LINDVALL: You're going to be looking at  
6 deposition testimony. It's going to be video on the screen  
7 and we will be playing excerpts from a deposition of Dr.  
8 Axel Peters. Now, he's the Chief Operating Officer of  
9 Broetje. He's an employee of Broetje and he's the Chief  
10 Operating Officer. And this is Broetje Germany.

11 He will discuss the development and use of  
12 Broetje's rivet distribution system and also Broetje's  
13 awareness of AHG's patents and Broetje's redesign of its  
14 cassette in response to the French Court judgment.

15 Please note, though, you'll see various clips.  
16 The final clip was done over a telephone, so you'll hear a  
17 different sound, between Germany and the U.S., so the sound  
18 quality may be poor. Dr. Peters also will be testifying  
19 during that portion through a translator from German to  
20 English.

21 Thank you.

22 THE COURT: All right. Ladies and gentlemen,  
23 understand a deposition is testimony that is given under  
24 oath but out of Court and we'll turn the lights down.

25 Go ahead and play it, please.

Peters - designations

1 (Videotaped deposition of Dr. Axel Peters was  
2 played as follows.)

3 "Question: For the record, could you please  
4 state your full name?

5 "Answer: Axel Peters.

6 "Question: Now, Dr. Peters, as you understand,  
7 you're under oath in this proceeding?

8 "Answer: Yeah.

9 "Question: Okay. Dr. Peters, who are you  
10 currently employed by?

11 "Answer: Broetje Automotive GmbH.

12 "Question: What is your position?

13 "Answer: I am chief operating officer. Head of  
14 operations.

15 "Question: When did you become employed by  
16 Broetje Germany?

17 "Answer: 2008.

18 "Question: Can you give me a better idea? Was  
19 it -- what month in --

20 "Answer: September.

21 "Question: Now, you understand that you're here  
22 to testify on behalf of Broetje Germany, correct?

23 "Answer: Uh-huh.

24 "Question: And that your answers or your  
25 responses to my questions will be responses to behalf of the

Peters - designations

1 company?

2 "Answer: Yes.

3 "Question: Okay. Have you seen this document  
4 before, Exhibit --

5 "Answer: No, I haven't seen this one.

6 "Question: Do you know whether this letter,  
7 this agency contract, refers to AHG's fastening system or  
8 not, fastening feeding system?

9 "Answer: Just says something from agency  
10 contract.

11 "Question: And you don't know what the agency  
12 contract is?

13 "Answer: No. I haven't seen it.

14 "Question: Do you know what other systems other  
15 than fastening systems that Broetje was discussing with AHG  
16 in this time frame?

17 "Answer: I don't think any other systems.

18 "Question: You think that the only systems that  
19 were being discussed between AHG and Broetje in this time  
20 frame were the fastening feeding systems?

21 "Answer: Might be, yeah.

22 "(Exhibit 41 marked for identification.)

23 "Question: So you what you've marked as Exhibit  
24 41. This has production numbers BA1238 through 1294.

25 "Answer: Yeah.

Peters - designations

1 "Question: Have you ever seen this document?

2 "Answer: Yeah."

3 (Videotaped deposition stopped.)

4 MR. LINDVALL: Your Honor, at this time we are  
5 going to move to enter into evidence JTX-14 and have it  
6 published side by side so the jury can understand his  
7 testimony.

8 THE COURT: Any objection?

9 MR. KELLEHER: No objection.

10 THE COURT: All right. It's admitted.

11 (JTX-14 was admitted into evidence.)

12 (Videotaped deposition resumed.)

13 "Question: What is this?

14 "Answer: It's an internal documentation for the  
15 development of the rivet feeding system.

16 "Question: Okay. And this is dated June 23,  
17 2003?

18 "Answer: Yes.

19 "Question: And this is all proprietary,  
20 correct?

21 "Answer: Yes.

22 "Question: Okay. And this document relates,  
23 you said, to the development by Broetje of a rivet feeding  
24 system?

25 "Answer: Yes.

Peters - designations

1 "Question: And what was the purpose of  
2 developing a rivet feeding system?

3 "Answer: The purpose was to have our own  
4 feeding system.

5 "Question: And in 2003, is that when CLAAS  
6 purchased Broetje?

7 "Answer: I don't -- you have to ask -- no, I  
8 can't really say that. I can't really prove that.

9 "Question: Okay. Now, if you look on page  
10 BA1250 of Exhibit 41.

11 "Answer: Yeah.

12 "Question: The left-hand photograph, what is  
13 that?

14 "Answer: It's an AHG system.

15 "Question: What type of system is that? Do you  
16 know?

17 "Answer: It's a loading station.

18 "Question: Loading station?

19 "Answer: Yeah.

20 "Question: Do you know why AHG's loading  
21 station system photograph was in Broetje's development  
22 document for their own system?

23 "Answer: Because it's an example of an existing  
24 equipment on the market.

25 "Question: And Broetje had used AHG systems?



Peters - designations

1 "Answer: Yes.

2 "Question: If you would turn to page BA1255 on  
3 Exhibit 41.

4 "Answer: Yes.

5 "Question: 1255. Are you on that?

6 "Answer: 55. Oh, sorry.

7 "Question: Yeah. 1255.

8 "Answer: Yeah.

9 "Question: Do you know what that is that's  
10 shown?

11 "Answer: Yes.

12 "Question: What is it?

13 "Answer: Rivet cassette.

14 "Question: And who manufactures this rivet  
15 cassette?

16 "Answer: AHG.

17 "Question: Okay. Do you know why this -- AHG's  
18 rivet cassette is being shown in Broetje's internal  
19 documentation relating to its development of its own  
20 cassette?

21 "Answer: Because it's an example of the rivet  
22 cassette.

23 "Question: And why would there be an example of  
24 a rivet cassette shown?

25 "Answer: Because you want to develop your own

Peters - designations

1 system. Because we wanted to develop our own system.

2 "Question: And if you turn to the next page of  
3 Exhibit 41, do you know what -- whose cassette this is?

4 "Answer: 1256?

5 "Question: 1256, yes.

6 "Answer: This is also AHG.

7 "Question: How can you tell?

8 "Answer: Because we didn't use this counters in  
9 front, the number counters.

10 "Question: Okay. And if you turn to the next  
11 page on 1257 --

12 "Answer: Yeah.

13 "Question: -- page 1257, Exhibit 41, do you  
14 know whose cassette system this is?

15 "Answer: Also AHG.

16 "Question: Okay. And how can you tell that?

17 "Answer: I guess because of the closer here.

18 The -- how is you say -- the cap.

19 "Question: With the little chain on it?

20 "Answer: Yes.

21 "Question: And is that because Broetje didn't  
22 have the little chain?

23 "Answer: We didn't have this chain, no.

24 "Question: Okay. And if we turn to the next  
25 page on BA1258 of Exhibit 41, do you know whose cassette

Peters - designations

1     that is?

2                     "Answer:  Yes.

3                     "Question:  Whose?

4                     "Answer:  AHG.

5                     "Question:  And what's that a photograph of?

6                     "Answer:  It's the separator.

7                     "Question:  Okay.  Do you know why the  
8     photograph of the AHG separator for the cassette is shown in  
9     Broetje's internal documentation to develop its own  
10    cassette?

11                    "Answer:  Because it's an example of a  
12    separator.

13                    "Question:  Now, if you turn to page BA1262 of  
14    Exhibit 41.

15                    "Answer:  Yes.

16                    "Question:  Do you know whose cassettes those  
17    are?

18                    "Answer:  Yes.

19                    "Question:  Whose?

20                    "Answer:  AHG.

21                    "Question:  How do you know they're AHG's  
22    cassettes?

23                    "Answer:  Because it's a plastic cover -- or  
24    plastic side sheets.

25                    "Question:  Okay.  If you turn to the next page

Peters - designations

1 on BA1263 of Exhibit 41, do you know whose portion of the  
2 rack that is?

3 "Answer: It must be also AHG.

4 "Question: Okay. And if you turn to BA1264  
5 of Exhibit 41, do you know whose portion of the rack that  
6 is?

7 "Answer: Also AHG.

8 "Question: Okay. Now, you bought cassettes for  
9 approximately, what, seven years from AHG? Seven,  
10 eight years until you developed your own product?

11 "Answer: Yeah.

12 "Question: So you -- so you bought the product  
13 and sold it to your customer for seven or eight years?

14 "Answer: Yes.

15 "Question: AHG's product; correct?

16 "Answer: Yes.

17 "Question: And it wasn't until that period of  
18 time went by that you decided to develop your own system?

19 "Answer: Correct.

20 "Question: And in developing your own system,  
21 you used as an example of developing your own system AHG's  
22 own product; correct?

23 "Answer: Yes.

24 "Question: How long did it take Broetje to  
25 develop its own fastener feeding system that's shown in

Peters - designations

1 Exhibit 41? Do you know how long that development took?

2 "Answer: One year.

3 "Question: Okay. And do you know whether  
4 anyone at Broetje told AHG that Broetje was developing their  
5 own fastener feeding system during this time frame?

6 "Answer: I don't know that.

7 "Question: You don't know one way or another?

8 "Answer: I don't know if anybody told  
9 something. I don't know.

10 "Question: And the intent was to replace AHG's  
11 fastener feeding system with Broetje's fastener feeding  
12 system?

13 "Answer: Yes.

14 "Question: Okay. So Broetje had completed its  
15 development of its own fastener feeding system in the time  
16 frame in 2004? Does that sound right?

17 "Answer: End of 2004, yeah.

18 "Question: Now, if we look on page BA1263 of  
19 Exhibit 41, do you know what component we're looking at  
20 there?

21 "Answer: Yes.

22 "Question: What component is that?

23 "Answer: It's the rack.

24 "Question: Okay. And who made the rack in --  
25 at the time this document was produced?

Peters - designations

1 "Answer: F2C2.

2 "Question: And that would likely be F2C2's  
3 component; correct?

4 "Answer: I guess, yeah.

5 "Question: And next page, on BA1264 on Exhibit  
6 41, and what component is this? Is this part of the rack?

7 "Answer: Yes.

8 "Question: And that would likely be F2C2's,  
9 correct?

10 "Answer: Yes.

11 "Question: In Exhibit 41, the only rack,  
12 loading station, and cassette that is shown as an example is  
13 AHG's; is that correct?

14 "Answer: Yeah. In this document, yes.

15 "Question: Okay. Now, other than AHG's  
16 cassette, are there any other cassettes that can fit on  
17 Broetje's fastening machines?

18 "Answer: No. If you are just talking about  
19 cassettes.

20 "Question: Okay. What about racks? Are there  
21 any -- any other racks besides AHG's racks that can be used  
22 with Broetje's fastening machines?

23 "Answer: If you are just talking about racks,  
24 no.

25 "Question: In the 2000 time -- 2003 time frame,

Peters - designations

1 did anyone have any loading systems which could be used to  
2 load either -- well, load AHG cassettes?

3 "Answer: Not to load AHG cassettes, no.

4 "Question: So only AHG loading systems could be  
5 used to load AHG cassettes?

6 "Answer: At this time, yes."

7 "Question: If you could look at Exhibit 11,  
8 please.

9 "Answer: Yes.

10 "Question: Okay. Have you ever seen this  
11 document do before?

12 "Answer: Some kind of, yeah.

13 "Question: Okay. What's the purpose of this  
14 document?

15 "Answer: It's a user manual.

16 "Question: Do you have these user manuals in  
17 English also?

18 "Answer: Yeah, we should have.

19 "Question: And this is for the Broetje  
20 cassette?

21 "Answer: Yes.

22 "Question: These type of documents are  
23 maintained on your servers in Germany?

24 "Answer: Yes.

25 "Question: Okay. And you'd expect you'd have

Peters - designations

1 an English version of this document in your servers?

2 "Answer: If we didn't provide any, yes.

3 "Question: If we could look at Exhibit 12,  
4 please.

5 "Answer: Uh-huh.

6 "Question: Have you seen Exhibit 12 before?

7 "Answer: Yes.

8 "Question: And what is the purpose of this  
9 document?

10 "Answer: Description of the AFFS.

11 "Question: Is this a description of the AFFS of  
12 AHG or Broetje?

13 "Answer. It's from AHG.

14 "Question: And was this document created by  
15 Broetje?

16 "Answer: Yes.

17 "Question: And is this used with customers?

18 "Answer: No.

19 "Question: Who's it used with?

20 "Answer: It's internal presentation of the  
21 system.

22 "Question: Why would you have an internal  
23 presentation of the system?

24 "Answer: To know what the system is with, what  
25 components are there and so on. To know what the system is,



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1     yeah.

2                   "Question: To understand the function and  
3     operation of the system?

4                   "Answer: Just to show what the components are,  
5     and, yeah, what the function of each component is.

6                   "Question: Who would -- who at Broetje -- what  
7     type of person would -- at Broetje would have access to this  
8     type of documents? Engineers?

9                   "Answer: Engineers, yeah, for example, because  
10    you have the dimensions in here you need when you want to  
11    place them on the machine.

12                  "Question: And why is a document like this  
13    created?

14                  "Answer: You need to know how things look, how  
15    they behave, and how you can use them in your system. Just  
16    to have an overview.

17                  "Question: Did you know that AHG had U.S.  
18    patents?

19                  "Answer: Yes.

20                  "Question: Okay. And you knew that before this  
21    lawsuit was filed?

22                  "Answer: Yes.

23                  "Question: Do you know when Broetje learned  
24    that AHG had U.S. patents?

25                  "Answer: 2003.

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1 "Question: In 2003?

2 "Answer: Yes.

3 "Question: And the U.S. patents that Broetje  
4 learned about were Exhibits 2 and Exhibit 3?

5 "Answer: Yes.

6 "Question: And that was -- they learned about  
7 those patents in 2003; correct?

8 "Answer: Yes.

9 "Question: And do you know when Dr. Budach  
10 created his opinion relating to the U.S. patents, Exhibit 2  
11 and Exhibit 3?

12 "Answer: Yes.

13 "Question: When?

14 "Answer: 2003.

15 "Question: Besides AHG, do you know of any  
16 other companies which sell cassettes such as Exhibit 7, or  
17 as AHG's cassette, which could be used with Broetje's  
18 fastening machines in the United States?

19 "Answer: No.

20 "Question: So when I mention PTX-605, that is  
21 the actual physical redesign cassette that you have with  
22 you?

23 "Answer: Ya.

24 "Question: You understand that, Dr. Peters?

25 "Answer: Yes. I said yes already."

Peters - designations

1 MR. LINDVALL: Your Honor, for context, may I  
2 have PTX-615.

3 THE COURT: Yes. 615? You may.

4 MR. KELLEHER: No objection.

5 MR. LINDVALL: It's the redesign.

6 THE COURT: 615 is not in evidence yet?

7 MR. LINDVALL: No, it is not.

8 THE COURT: So you are moving?

9 MR. LINDVALL: We'll move it.

10 THE COURT: 615 is admitted.

11 (PTX-615 is admitted into evidence.)

12 THE COURT: For the record, it is being left on  
13 the table near the jury box.

14 MR. LINDVALL: I'm sorry. The cassette is the  
15 exhibit number PTX-650.

16 THE COURT: 650?

17 MR. LINDVALL: 650. I'm sorry.

18 THE COURT: Any objection to 650?

19 MR. KELLEHER: No objection.

20 THE COURT: Exhibit 650 is admitted.

21 (PTX-615 is admitted into evidence.)

22 THE COURT: Go ahead and play the rest of it.

23 "Question: Okay. What does the Exhibit PTX-615  
24 show?

25 "Answer: 615 shows a photography of the

Peters - designations

1 cassette.

2 "Question: Okay. And is this the same cassette  
3 as the cassette PTX-650 that you have with you?

4 "Answer: Ya.

5 "Question: Now, Dr. Peters, were you yourself  
6 personally involved in the redesigning of the cassette?

7 "Answer: Ya.

8 "Question: Okay. And when did Broetje begin  
9 redesigning this cassette?

10 "Answer: After we got a court judgment in  
11 France.

12 "Question: And what about the court judgment in  
13 France caused you to redesign the cassette?

14 "Answer: We were informed by our legal staff  
15 that we would have to redesign, newly design the cassette.

16 "Question: Okay. Did they tell you why you had  
17 to redesign the cassette?

18 "Answer: So that the cassette would be clearly  
19 recognizable as our cassette.

20 "Question: And what is PTX-651?

21 "Answer: 651 is the construction drawing of the  
22 cassette.

23 "Question: Okay. And is this the construction  
24 drawing of the new cassette, the new redesign cassette?

25 "Answer: It is not redesigned, it has just

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1 changed in color, and that's the design for the change.

2 "Question: Okay. So you said the cassette had  
3 changed in color. What colors had changed in the cassette  
4 from the original Broetje cassette?

5 "Answer: The handle is now the silver color.

6 "Question: Okay. So the color of the handle  
7 changed from black to silver; is that correct?

8 "Answer: Ya.

9 "Question: Okay. Has shape of the handle  
10 changed?

11 "Answer: There is a slight change in the  
12 geometry.

13 "Question: Okay. What about the change -- has  
14 there been any change in colors of the, the chrome color  
15 that the original Broetje cassette had?

16 "Answer: The sheet metal covering of the  
17 cassette has been changed to red.

18 "Question: Okay. Now, has the coloring of the  
19 clear plastic cover changed?

20 "Answer: We added the company branding to the  
21 plastic cover and we left the openings for the hose and the  
22 separator.

23 "Question: Now, was there any change with  
24 respect to the function of the cassette?

25 "Answer: We did not make any changes in the

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1 function of the cassette.

2 "Question: Now, let's look at the Exhibit  
3 PTX-652. It's a drawing.

4 "Answer: Okay. 652.1. Okay. Yes.

5 "Question: Yes. What is Exhibit PTX-651.1?

6 "Answer: It's a drawing of the inside view of  
7 the cassette.

8 "Question: And this is a drawing of the new  
9 cassette?

10 "Answer: It's a drawing of the old and a new  
11 cassette. The changes -- the changes that are shown are for  
12 the cover.

13 "Question: Okay. And what has changed with  
14 respect to the cover?

15 "Answer: The cover is more closed, and the two  
16 windows can be seen as well as the Broetje logo.

17 "Question: Now, how long did it take to make  
18 these changes to the cassette?

19 "Answer: The constructive changes were  
20 implemented fairly quickly. What is a little bit more time  
21 consuming is the coloring change of the metal covering.

22 "Question: Have you provided this new cassette  
23 to any customers?

24 "Answer: The cassette still is a prototype  
25 because we cannot put it yet into production.

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1           "Question: And does Broetje have any plans,  
2           once it takes care of that issue, to use these cassettes  
3           with any customers or provide these cassettes to any  
4           customers?

5           "Answer: We will in the future use this  
6           cassette as a matter of course.

7           "Question: Okay. And will you use this with  
8           all customers, including customers in the United States?

9           "Answer: As soon as we got the cassette  
10          working, we will do that.

11          "Question: Okay. Do you have an estimate in  
12          when this cassette will be finalized?

13          "Answer: Within the next one or two months.

14          "Question: I understand that the only thing  
15          that has changed with the new cassette is the colors and the  
16          shape of the handle; is that correct?

17          "Answer: That, and the printing on the cover.

18          "Question: Okay. And I understand that there  
19          has been nothing changed that would affect the function of  
20          the cassette; is that correct?

21          "Answer: We did not institute any functional  
22          changes.

23          "Question: Now, did you make any changes to the  
24          cross-sectional shape of the tubes that will be used?

25          "Answer: No, we did not make any changes on

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1 the -- on the tubes.

2 "Question: Dr. Peters, is there a way for you  
3 to give me an approximate estimate of what it costs Broetje  
4 to redesign this cassette?

5 "Answer: I cannot give an estimate because we  
6 did not make material design changes, and purchasing is now  
7 working on the color. And otherwise, the changes we made to  
8 the drawing took about two or three hours, but the new  
9 cassette definitely will be higher in price.

10 "Question: Do you understand that the French  
11 court found that the Broetje cassette was identical, had an  
12 identical exterior appearance to the cassette from AHG and  
13 F2C2 Systems?

14 "Answer: We were told that we had to change our  
15 design.

16 "Question: Okay. And you were told that by  
17 your lawyers; correct?

18 "Answer: Dr. Budach is the internal patent  
19 attorney.

20 "Question: So it was Dr. Budach that told you  
21 that you had to change the design?

22 "Answer: Ya.

23 "Question: Does Dr. Budach still represent  
24 Broetje?

25 "Answer: Yes, in this matter.



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1 "Question: Okay. And is Dr. Budach still  
2 employed by CLAAS?

3 "Answer: Ya.

4 "Question: Now, let me show you what has been  
5 marked as, it's PTX-613T.

6 "Answer: Ya.

7 "Question: And this is a translated version of  
8 the ruling by the Paris Court of Appeals. Do you see this?

9 "Answer: Ya.

10 "Question: Have you ever seen the decision by  
11 the French court?

12 "Answer: I've seen the decision in German.

13 "Question: Okay. Now, if you could turn to the  
14 page PTX-613T.23.

15 "Answer: Ya.

16 "Question: Okay. And if you look at the  
17 paragraph, one, two, three, the seventh paragraph down.

18 "Answer: Ya.

19 "Question: And there is a statement in there,  
20 it says, quote, but on the fact that this company  
21 commercializes cassettes that are identical to those from  
22 AHG at F2C2 Systems.

23 "Do you see that?

24 "Answer: Ya.

25 "Question: Okay. And then the next paragraph,

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1 if you look at the next paragraph on page -- it's PTX-613  
2 T.23. At the end, it says that the latter company,  
3 referring to Broetje, quote, is commercializing a cassette  
4 with an identical exterior appearance to the cassette from  
5 AHG and F2C2 System.

6 "Do you see that?

7 "Answer: I cannot make any statements on  
8 counsel matters.

9 "Question: Okay. But do you have an  
10 understanding that that's what the French court found?

11 "Answer: As I stated, Dr. Budach gave us  
12 instructions to change the color of the cassette.

13 "Question: Okay. Do you understand that  
14 Dr. Budach gave those instructions to you because the French  
15 court found that the Broetje cassette was identical in  
16 exterior appearance to the AHG and F2C2 cassette?

17 "Answer: You will have to check that with  
18 Dr. Budach.

19 "Question: Now, Dr. Peters, what was the goal  
20 of the project which led to what we see as Exhibit PTX-650,  
21 which was is the redesign cassette?

22 "Answer: As I said before, our legal staff  
23 insists that we change the way the cassette looks."

24 (Designations end.)

25 MR. LINDVALL: Thank you, Your Honor. I move to

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1 admit the exhibits that we laid the foundation on and they  
2 would be JTX-7, JTX-8, JTX-14, PTX-613T, PTX-615, PTX-650,  
3 PTX-651, and PTX-652.

4 THE COURT: Any objections?

5 MR. KELLEHER: I'm reserving what we had done  
6 earlier but no objection otherwise.

7 THE COURT: Okay. Those are all admitted.

8 (JTX-7, JTX-8, JTX-14, PTX-613 T, PTX-615,  
9 PTX-650, PTX-651, and PTX-652 are admitted into evidence.)

10 MR. LINDVALL: Thank you, Your Honor.

11 THE COURT: Well, we reached a good time for our  
12 lunch break. Ladies and gentlemen of the jury, I understand  
13 your lunches are here so we'll get those to you almost  
14 immediately. Of course, no talking about the case after the  
15 break and we'll get you back after the lunch.

16 (Jury left courtroom.)

17 THE COURT: All right. We'll check in about  
18 half an hour and see if there is anything we need to discuss  
19 before we bring the jury in.

20 We will be in recess.

21 (Lunch recess taken.)

22 \* \* \*

23 Afternoon Session - 1:00 p.m.

24 THE COURT: Bring the jury in.

25 MR. CAHR: Your Honor, we just came to an

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1 agreement.

2 THE COURT: All right. We'll put the agreement  
3 on the record. That's fine.

4 MR. CAHR: Sure.

5 MS. SHARP: Your Honor, I think that we've  
6 already put on the record the agreement is the reports do  
7 not go in, that every attachment to the reports goes in,  
8 both the original report and the supplemental report.  
9 Neither side will comment on the absence of underlying  
10 documents being admitted. That is they won't complain that  
11 there's some sort of failure of proof or insufficiency for  
12 not putting those documents in.

13 And if there's something, I can make the  
14 representations that the Court was looking for with respect  
15 to the Daubert issues. Round tubes were appropriately  
16 backed out where it was required to be done in both  
17 instances. In some situations, systems were used with  
18 infringing cassettes and cassettes with round tubes, so it  
19 was still appropriate to include those systems because they  
20 were used with both. But the round tubes had been backed  
21 out where they were supposed to be.

22 THE COURT: All right. And when you say  
23 "exhibits," it would be the exhibits that are attachments  
24 you are satisfied you can use with your expert or other  
25 witnesses, whatever it is from the expert report that you

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1 wanted to use?

2 MR. CAHR: And --

3 THE COURT: I'm asking first Ms. Sharp.

4 MS. SHARP: Yes. That's correct, Your Honor.

5 THE COURT: All right. Mr. Cahr?

6 MR. CAHR: And just to be clear, our agreement  
7 also extends to the financial summaries that we would be  
8 offering as well through Dr. Peters and other witnesses. So  
9 basically both sides have agreed that the financial  
10 summaries that we are going to be offering are not going to  
11 be challenged in terms of all of the underlying documents,  
12 and so, you know, they'll just come in.

13 MS. SHARP: Every time I think we've got it  
14 pinned down, there's something else added that's not fair.  
15 Well, they won't be challenged in the sense that we can  
16 still cross on whether the calculations were accurate, but  
17 we will not challenge the admission.

18 MR. CAHR: Right. No, no. No. Yes.

19 MS. SHARP: Got it.

20 THE COURT: The fact that the underlying  
21 documents are not in evidence will not be a basis for  
22 cross-examination.

23 MS. SHARP: Right.

24 MR. CAHR: Exactly right.

25 THE COURT: I think you have an agreement.

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1 MR. CAHR: And then just for clarity, the  
2 Daubert issues that we described in connection with the  
3 demonstrative, we understand from your ruling that we're  
4 just going to go forward with that. So we just would  
5 reserve our objections and we'll deal with that afterwards.

6 THE COURT: Right. Your objections are on the  
7 record. That's certain.

8 MS. SHARP: I note only that the objection to  
9 the supplemental report, the sole objection was hearsay.  
10 Daubert was not raised before today.

11 MR. CAHR: No, that's not true. They were  
12 raised --

13 THE COURT: Well, whatever objections have been  
14 raised have been ruled on, so let's bring the jury in.

15 MR. CAHR: Okay.

16 (The jury entered the courtroom.)

17 THE COURT: Welcome back, ladies and gentlemen.  
18 I hope you've had a good lunch. We are prepared to call. I  
19 will call on Mr. Lindvall to call the next witness.

20 MR. LINDVALL: Your Honor, it is going to be one  
21 more videotape. It's going to be the videotape of Kenneth  
22 Benczkowski, who is the Broetje representative here. Again,  
23 he's a Broetje employee. We're offering him in our case,  
24 AG's case. And we will play excerpts from his deposition.

25 And he's the President of Broetje USA. He will

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1     testify about Broetje's knowledge of AHG's patents and the  
2     development of Broetje's accused rivet distribution system.

3             THE COURT:   And about how long do you think this  
4     runs?

5             MR. HOROWITZ:  15 minutes, Your Honor.

6             THE COURT:   Okay.   Thank you very much.

7             (Designations of Kenneth Benczkowski placed into  
8     the record.)

9             "Question:   Could you please state your name for  
10    the record?

11            "Answer:   Kenneth Benczkowski.

12            "Question:   And, Mr. Benczkowski, who are you  
13    currently employed by?

14            "Answer:   I'm employed by Broetje Automation  
15    USA.

16            "Question:   How long have you worked for Broetje  
17    Automation USA?

18            "Answer:   Six years.   This is my sixth year.

19            "Question:   Okay.   What as your position with  
20    Broetje USA?

21            "Answer:   Currently, I'm the president.

22            "Question:   And how long have you been President  
23    of Broetje USA?

24            "Answer:   Since 2008.

25            "Question:   What was your position with Broetje

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1 before that?

2 "Answer: Vice President, Chief Operating  
3 Officer.

4 "Question: When did you first become aware that  
5 AHG had U.S. patents relating to the cassettes?

6 "Answer: When I received the notice for the  
7 case.

8 "Question: Okay. No one had, from Broetje  
9 Germany, had told you anything about these U.S. patents?

10 "Answer: No.

11 "Question: But you knew they had European  
12 patents; correct?

13 "Answer: Yes.

14 "Question: Now, other than those two  
15 individuals, did you talk to anyone else about this lawsuit,  
16 other than attorneys?

17 "Answer: Bernd Schroeder.

18 "Question: Okay. Who is he?

19 "Answer: He is general manager of Broetje  
20 Germany.

21 "Question: And what were those discussions with  
22 Mr. Schroeder?

23 "Answer: Basically the same. What was the  
24 status of the case.

25 "Question: What did he say?



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1           "Answer: He basically reiterated that -- the  
2 summary of the -- of where we stood with the German and  
3 French suits.

4           "Question: So just to go back to clarify one  
5 area, Broetje was surprised that AHG filed this lawsuit in  
6 the U.S. in light of the decisions in Germany and France; is  
7 that correct?

8           "Answer: To clarify, we were just surprised  
9 that a suit would be brought in the U.S. Not because of  
10 outcomes in other countries. Just the fact that it seemed  
11 very late in the game and the fact that these suits in other  
12 cases were not going well in other places, to the best of  
13 our understanding. Just didn't make a lot of sense.

14           "Question: And why didn't it make sense, though?

15           "Answer: We did not feel that it was viable.

16           "Question: Have you ever seen an opinion of  
17 outside counsel relating to whether or not the patents in  
18 Exhibit 2 or Exhibit 3 are infringed?

19           "Answer: No.

20           "Question: Have you ever seen an opinion of  
21 outside counsel to show whether the patents which are shown  
22 in Exhibit 2 and Exhibit 3 are invalid?

23           "Answer: No.

24           "Question: Have you, yourself, in your position  
25 as CEO for Broetje USA, ever requested an opinion of counsel

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1 to determine whether the patents, Exhibit 2, Exhibit 3, are  
2 infringed or not?

3 "Answer: No.

4 "Question: Why not?

5 "Answer: Based on the fact that we are selling  
6 systems that are originating in Germany and the fact that  
7 these systems have, again, related back to the suits that  
8 were placed in Germany and France, did not really see the  
9 need.

10 "Question: Okay. Now, did Dr. Budach ever give  
11 an opinion relating to the validity of either Exhibit 2 or  
12 Exhibit 3?

13 "Answer: I do not know.

14 "Question: Okay. To the best of your  
15 knowledge, Dr. Budach gave an opinion in the e-mail relating  
16 to the infringement of the patents in Exhibit 2 and  
17 Exhibit 3; is that correct?

18 "Answer: No, they were not related to these two  
19 documents at all.

20 "Question: Okay. What was Dr. Budach's opinion  
21 related to, his e-mail opinion?

22 "Answer: I believe it was related to the suit  
23 with the German court.

24 "Question: So it related to the German patent?

25 "Answer: Correct.

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1 "Question: Have you ever seen an opinion of  
2 counsel, whether in-house or outside counsel, relating to  
3 the infringement or invalidity of Exhibits 2 or Exhibit 3?

4 "Answer: No.

5 "Question: This e-mail that you saw, Dr. Budach's,  
6 was this in German or in English?

7 "Answer: It was in German.

8 "Question: Okay. So you weren't able to read  
9 it; is that correct?

10 "Answer: No.

11 "Question: How did you understand what it  
12 meant?

13 "Answer: I was told what it said.

14 "Question: Who told you.

15 "Answer: Bernd Schroeder.

16 "Question: When did Mr. Schroeder tell you?

17 "Answer: When I raised the question after the  
18 suit was raised.

19 "Question: Okay. So when, at that point in  
20 time, rather than just talked about the status of the case,  
21 he also said that Dr. Budach had come up with an opinion  
22 relating to the AHG German patent?

23 "Answer: I don't believe it was stated in that  
24 manner. It was more to the fact that we have an opinion  
25 that says we do not infringe.

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1 "Question: Were you involved in Broetje's  
2 decision to stop using AHG's cassette?

3 "Answer: No.

4 "Question: Okay. And that was a decision made  
5 at Broetje Germany?

6 "Answer: Yes.

7 "Question: Now, in your experience, working at  
8 Broetje, have you seen any AHG cassettes being used with  
9 Broetje fastener machines?

10 "Answer: Yes.

11 "Question: Okay. Is that even true today?

12 "Answer: Yes.

13 "Question: Okay. And, for example, can you  
14 give me some examples of locations where the AHG cassettes  
15 are being used with the Broetje fastener machines?

16 "Answer: Yes. There are machines in Wichita  
17 which use the AHG cassette as well as the rack and loading  
18 station.

19 "Question: There are some Broetje fastener  
20 machines which use an AHG rack, cassette, and loading  
21 station?

22 "Answer: Yes.

23 "Question: Other than AHG's or Broetje's rack,  
24 cassette, and loading stations, do you know of any other  
25 third-party rack, cassettes, or loading stations that are

Benczkowski - designations

1 used with a -- with Broetje fastening machines?

2 "Answer: No.

3 "Question: Do you know whether there are any  
4 third parties who market to Broetje's U.S. customers rack,  
5 cassettes, or loading stations which can be used with the  
6 Broetje fastening machine?

7 "Answer: No.

8 "Question: You don't know of any other parties  
9 other than Broetje and AHG?

10 "Answer: As far as supply of?

11 "Question: Supply of rack, cassettes, and  
12 loading stations for the Broetje.

13 "Answer: Correct. I know of no others.

14 "Question: Okay. Now, with respect to the AHG  
15 rack, cassette, and loadings stations that are being used on  
16 Broetje fastening machines, do you know who maintains those,  
17 those components?

18 "Answer: The customers maintain their  
19 components.

20 "Question: Okay. So the customers would  
21 maintain the AHG rack, cassette, and loading stations?

22 "Answer: Yes.

23 "Question: Okay. You said that Broetje USA  
24 started back in around 2006; correct?

25 "Answer: Yes.

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1 "Question: Exhibit 7. Can you identify what  
2 Exhibit 7 is?

3 "Answer: Yes. This is a Broetje cassette.

4 "Question: Okay. And is this in its current  
5 form does it look like?

6 "Answer: It appears to be, yes.

7 "Question: Okay. As far -- as long as you have  
8 worked at Broetje, has it changed in any way?

9 "Answer: No, this has been the configuration.

10 "Question: So is it your testimony, or the  
11 testimony of Broetje, that this is representative of all of  
12 the different cassettes that Broetje uses for its fastener  
13 machine?

14 "Answer: Yes.

15 "Question: The Broetje riveting machine, the  
16 large machine -- let's exclude the feed system, let's  
17 exclude the racks, cassettes, and loading stations -- how  
18 many of those machines are there in the United States, to  
19 the best of your knowledge?

20 "Answer: Approximately 40.

21 "Question: Okay. And out of the 40  
22 approximately, there's 10 or 11 of those have the AHG rack,  
23 cassette, and loading machine -- loading station; correct?

24 "Answer: Yes.

25 "Question: Let me show the what we've marked as

Benczkowski - designations

1 Plaintiffs' Exhibit No. 8. It has production numbers BA3229  
2 through 3232.

3 "Have you ever seen this document?

4 "Answer: Not in this specific form, but similar.

5 "Question: Do you know what the purpose of this  
6 document is for?

7 "Answer: This is usually used in a presentation  
8 that we will make to the customer as part of the sales process.

9 "Question: Okay. And I notice this is in  
10 English; correct?

11 "Answer: Yes.

12 "Question: Would this be maybe the type of  
13 presentation you would make to a customer in the U.S.?

14 "Answer: It would be one page of a rather large  
15 presentation that will go through all the detail of all the  
16 components of a system.

17 "Question: Now, this particular document is  
18 called automatic fastener feed system; correct?

19 "Answer: Yes.

20 "Question: And you have heard of that before;  
21 right?

22 "Answer: Yes.

23 "Question: Okay. And the automatic fastener  
24 feed system is made of the cassette, the fastener loading  
25 station, and a rack; correct?

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1 "Answer: And also the manual feed.

2 "Question: Where's the manual feed? Oh, the  
3 manual feed down at the bottom there?

4 "Answer: Right.

5 "Question: Now, if you turn to the second page  
6 of Exhibit 8, BA3230. And this is of a cassette; correct?

7 "Answer: Yes.

8 "Question: And this is -- this is the same as  
9 Exhibit 7 which is in front of you?

10 "Answer: Yes.

11 "Question: Now, does Broetje manufacture their  
12 own cassettes?

13 "Answer: Yes.

14 "Question: Okay. Do they manufacture their own  
15 racks?

16 "Answer: Yes.

17 "Question: Do they manufacture their own  
18 loading stations?

19 "Answer: Yes.

20 "Question: I'll show you what I've marked as  
21 Plaintiffs' Exhibit No. 12, production numbers BA3213  
22 through 3222.

23 "Have you ever sen this document before?

24 "Answer: Perhaps not this document, but  
25 similar.



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1 "Question: Do you know what this would be used  
2 for?

3 "Answer: This would be part of an old  
4 presentation.

5 "Question: Who would you make this presentation  
6 to?

7 "Answer: This would be made to an aerospace  
8 customer.

9 "Question: Okay. Now, I notice there's a  
10 proprietary sticker emblem on here on the left.

11 "Do you see that?

12 "Answer: Yes.

13 "Question: What's the purpose of that?

14 "Answer: The purpose of that is to protect our  
15 intellectual property from being copied or distributed to  
16 others within the confines of our customer base.

17 "Question: Okay. Do you consider the drawings  
18 and what as in this document to be proprietary to Broetje?

19 "Answer: We consider everything that we share  
20 with a customer to be proprietary.

21 "Question: And would you consider the drawings  
22 in here to be highly confidential information to Broetje?

23 "Answer: It is highly confidential to us, so  
24 as not to be disclosed to others, to prevent others from  
25 copying --

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1 "Question: Okay.

2 "Answer: -- our concepts. It's on every one of  
3 our presentations.

4 "Question: Let's look on page BA3216 -- by the  
5 way, do you know when this document was created?

6 "Answer: No, I don't.

7 "Question: Okay. If we look at BA3216, which  
8 is the fourth page in. And do you know who makes the racks  
9 that are shown there?

10 "Answer: Based on the label, it says 'AHG.'

11 "Question: Okay. So at this particular time,  
12 Broetje was marketing AHG racks?

13 "Answer: It appears so.

14 "Question: Now, if you look on page BA3221 of  
15 Exhibit 12. And do you know who appears to have  
16 manufactured the loading station shown there?

17 "Answer: It also says 'AHG.'

18 "Question: Now, if you turn to the last page of  
19 Exhibit 12, there's a cassette, correct?

20 "Answer: Correct.

21 "Question: Do you know who manufactured that  
22 cassette?

23 "Answer: That would be AHG.

24 "Question: And how do you -- how can you tell  
25 that?

Benczkowski - designations

1 "Answer: From the appearance of the escapement  
2 mechanism.

3 "Question: Okay. Could you be more particular?

4 "Answer: The upper right-hand corner of the  
5 cassette.

6 "Question: Okay. And that's how you can tell  
7 that from an AHG versus a Broetje cassette?

8 "Answer: How I can, yes. And, also, if you  
9 look at this -- it appears something is written on this  
10 tape, and the fact that it's color tape would also be  
11 indicators that it's someone else's.

12 "Question: Okay. So the fact that there's a  
13 different color tape and the escapement has a little bit of  
14 different design, is the differences you see in the AHG  
15 versus the Broetje cassette?

16 "Answer: The handle appears to be different.  
17 So does the cap on the opposing end of the tube.

18 "Question: Is there any internal legal  
19 department at Broetje, either Germany or USA?

20 "Answer: No.

21 "Question: Broetje relies on its parent  
22 company, CLAAS, for legal advice?

23 "Answer: We will first go to CLAAS, and then,  
24 if instructed by CLAAS, we will then seek other counsel.

25 Question: And Broetje Germany and Broetje USA

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1 are wholly owned subsidiaries of CLAAS; is that correct?

2 "Answer: Broetje USA is a wholly-owned  
3 subsidiary of Broetje Germany, and then Broetje Germany is,  
4 of course, opened by CLAAS, yes.

5 "Question: A hundred percent owned by CLAAS?

6 "Answer: Pardon?

7 "Question: Is Broetje Germany a hundred percent  
8 owned by CLAAS?

9 "Answer: Yes.

10 (End of videotaped deposition.)

11 THE COURT: Turn the lights back up.

12 MR. LINDVALL: Your Honor, we have one document  
13 we'd move for admission. It's JTX-4.

14 MR. KELLEHER: No objection.

15 THE COURT: Okay. It's admitted. Thank you.  
16 (JTX-4 was admitted into evidence.)

17 THE COURT: Call your next witness.

18 MR. LINDVALL: Yes, Your Honor. We call  
19 Dominique Hage.

20 THE COURT: Okay.

21 ... DOMINIQUE HAGE, having been duly sworn as a  
22 witness, was examined and testified as follows ...

23 THE COURT: Good afternoon to you and welcome,  
24 Mr. Hage.

25 I will note for the record is translator is in

Hage - direct

1 his vicinity as well in case it's necessary.

2 You may proceed.

3 MR. LINDVALL: Your Honor, may I approach the  
4 witness with an exhibit?

5 THE COURT: You may.

6 (Mr. Lindvall handed an exhibit book to the  
7 witness.)

8 DIRECT EXAMINATION

9 BY MR. LINDVALL:

10 Q. Good afternoon, Mr. Hage.

11 A. Good afternoon.

12 Q. Could you first state your name for the record.

13 A. My name is Dominique Hage.

14 Q. Okay. Now, Mr. Hage, where do you live?

15 A. I live in Toulouse, southwestern France.

16 Q. Okay. Now, what is your nationality?

17 A. I'm French.

18 Q. And who are you currently employed by?

19 A. I work for F2C2.

20 Q. Now, what is your job title at F2C2?

21 A. Vice President of Sales?

22 THE COURT: Just wait until the question is  
23 completed before you answer. I need you to wait until the  
24 question is completed before you answer.

25 THE WITNESS: No problem.

Hage - direct

1 THE COURT: Okay. Go ahead.

2 BY MR. LINDVALL:

3 Q. Now, could you explain to the jury what relationship  
4 is between AHG and F2C2.

5 A. F2C2 Systems is a fully owned subsidiary of AHG.

6 Q. Now, how long have you been Vice President of Sales  
7 at F2C2?

8 A. Since July 2007.

9 Q. Okay. Could you briefly describe to the jury what  
10 your responsibilities are as Vice President of Sales.

11 A. My responsibility includes promoting the sales of our  
12 equipment, customer relation, customer support, various  
13 trade events to which we attend.

14 Q. And could you briefly explain to the jury what F2C2  
15 sells.

16 A. F2C2 designs, manufactures and sells fastener or  
17 rivet fit systems, which are based around the cassette,  
18 which is the center of the system. A load station, which is  
19 to fill rivets into the cassette and a rack, which is used  
20 to receive the cassettes and use the cassettes, rivets, to  
21 supply rivets to the automatic riveter.

22 Q. Okay. Do those three components, the cassettes, the  
23 racks and loading station, all function as one operational  
24 unit?

25 A. They do.

Hage - direct

1 Q. Now, Mr. Hage, who are F2C2's primary customers in  
2 the United States for the cassette based rivet distribution  
3 system?

4 A. The primary customers for our rivet distribution  
5 system in the U.S. are what I'm going to call integrators,  
6 the people manufacturing automatic riveters.

7 Q. Okay. And could you name some of those integrators.

8 A. Certainly. I could think of Kuka system, located  
9 in Michigan. Then you have Gemcore in upper New York  
10 State. You've got automatic integrated technology in Plano,  
11 Texas. Then you have ElectroImpact in Washington State.

12 Q. Now, do these companies that you just named, do they  
13 compete with Broetje?

14 A. They do.

15 Q. And do these companies provide the cassette-based  
16 rivet feed systems made by F2C2?

17 A. They do. They use our system.

18 Q. Now, do you sell to customers other than integrators?

19 A. We have a commercial relation as well with the  
20 aircraft manufacturers, who are the end users of the  
21 automatic riveter, of course.

22 Q. All right. And who are some of those aircraft  
23 manufacturers in the United States that F2C2 has a business  
24 relationship with?

25 A. Well, I think the largest, Boeing, then you have Gulf

Hage - direct

1 Stream, Spirit, who is next to Bowling.

2 Q. Do you do any business with Vought?

3 A. We do business with Vought from time to time.

4 Q. Now, do you know of any other company using or  
5 selling a cassette based rivet distribution system in the  
6 United States that competes with F2C2's system?

7 A. Yes. Broetje sells a copy of our cassettes.

8 Q. Is there anyone than Broetje that competes with F2C2  
9 in the United States?

10 A. No.

11 Q. Has Broetje ever offered to sell its cassette based  
12 rivet feeding system to integrated companies, to the best of  
13 your knowledge?

14 A. Has been approached in 2008 and the integrator  
15 approach was Kuka System in Michigan.

16 Q. And what do you understand Broetje was trying to sell  
17 to Kuka in Michigan?

18 A. Cassette feeding system.

19 Q. And it was going to be Broetje's cassette feeding  
20 system?

21 A. That they used?

22 Q. Yes.

23 A. No. They used ours.

24 Q. But what Broetje was offering was not AHG's system.  
25 It was Broetje's own system; is that correct?



Hage - direct

1 A. That's correct.

2 Q. Okay. And did AHG bid for this job also?

3 A. I beg your pardon?

4 Q. Did AHG also offer to sell its system to Kuka?

5 A. Yes. We were offering our system as well to this  
6 company.

7 Q. Okay. And what system did Kuka ultimately buy,  
8 Broetje's or AHG's?

9 A. We didn't win the contact. F2C2 did.

10 Q. Now, could you explain what capabilities F2C2 has to  
11 meet customer demands for the F2C2 cassette-based rivet  
12 distribution system?

13 A. Of course. We have a plant in France where we're  
14 going to manufacture all those stations and some rack  
15 systems and cassette systems. But since the business is  
16 increasing tremendously for us, in the U.S. specifically, we  
17 have started implementing relationship with some  
18 subcontractors on U.S. soil to start building our systems  
19 here for the U.S. market. And the demand has been really  
20 going up in the past years and our system has been on the  
21 market for some time and it has become a standard in the  
22 industry.

23 Q. Now, has F2C2 ever had any difficulties in meeting  
24 its customer demands?

25 A. No. We have no problem with that.

Hage - direct

1 Q. Now, let me show you what has been marked as PDTX-14.  
2 It's in your book there. This is for demonstrative  
3 purposes.

4 Do you recognize this?

5 A. Yes. It's a chart of financial flow.

6 Q. Okay. Could you explain how this chart was  
7 generated.

8 A. This chart is being generated from inputs coming from  
9 AHG accounting department.

10 Q. Okay. And to the best of your knowledge, do you  
11 believe it's an accurate depiction?

12 A. I do believe it's accurate.

13 Q. And as part of your job responsibilities, you have an  
14 understanding of AHG's accounting department?

15 A. To some extent, yes.

16 MR. LINDVALL: I move to admit the exhibit as  
17 evidence.

18 THE COURT: There's no objection?

19 MS. BEYER: No objection.

20 THE COURT: It's admitted. PDTX-14; correct?

21 MR. LINDVALL: Yes, Your Honor. Thank you.

22 BY MR. LINDVALL:

23 Q. Okay. The blue line, what does the blue line  
24 represent?

25 A. The blue line represents the volume of sales

Hage - direct

1 generated by business with Broetje automation from year 2000  
2 to 2013.

3 Q. Okay. Now, I see in the blue line (AHG's sales to  
4 Broetje), the blue line here reaches a peak around 2002. By  
5 the way, this is in Europe; is that correct?

6 A. This is in Europe, right.

7 Q. What's approximate exchange rate, euro to a dollar?

8 A. Nowadays, unfortunately, it's 1.37.

9 Q. So it takes a dollar 37 to buy one euro?

10 A. That's right.

11 Q. And in approximately 2002 you reached a peak, and  
12 these are sales to Broetje; is that correct?

13 A. That's right.

14 Q. And it goes down; is that correct?

15 A. It does.

16 Q. Okay. And do you have any knowledge of why the sales  
17 start decreasing to Broetje?

18 A. Well, there has been a very sharp decrease in volume  
19 of orders coming from Broetje Automation in this period of  
20 time.

21 Q. Okay. And did AHG have any understanding in the  
22 2002, 2003, 2004 time frame on why the orders were starting  
23 to decline?

24 A. No, no idea.

25 Q. Okay. Now, the red line, what does the red line

Hage - direct

1 represent?

2 A. The red line represents the amount of sales we did  
3 with other customers, such as integrators or aircraft  
4 manufacturers other than Broetje during this period.

5 Q. Okay. And I notice that the, there was an increase  
6 in sales starting particularly around 2004, 2005; is that  
7 correct?

8 A. That is correct.

9 Q. Okay. And more recently, since 2010, there has been  
10 a fairly high amount of sales; is that correct?

11 A. That's true. If you take a look at the 2004 area  
12 there, you can see that our total was really low and we  
13 needed to react and expand our business and customer base.  
14 This is what the company did then until business really  
15 picked up towards the aircraft sales and we now had a record  
16 year in 2013.

17 Q. Okay. What do you attribute this sudden increase in  
18 sales to? Well, the sales increase from 2010 on wards?

19 A. Well, our equipment is known and appreciated by  
20 industry and they do require it in that specification.

21 Q. Now, has F2C2 had business relationships with  
22 aircraft manufacturers in the United States?

23 A. Yes.

24 Q. And do you know approximately when these  
25 relationships began?

Hage - direct

1 A. Probably around mid-nineties.

2 Q. And, again, who were the aircraft manufacturers that  
3 F2C2 had business relationships with?

4 A. Boeing, to begin with, Gulf Stream. That's the ones  
5 I'm thinking of.

6 Q. Spirit, did you have a business relationship with?

7 A. Yes, of course. Spirit. But then it was Boeing.

8 Q. All right. Now, what is the relationship between  
9 F2C2's integrator, customer in the United States and  
10 Broetje?

11 A. They compete against each other.

12 Q. And then what is the relationship between AHG or  
13 F2C2's cassette-based rivet distribution system and  
14 Broetje's cassette-based rivet distribution system?

15 A. They're in competition.

16 Q. And they're in competition with either, with each  
17 other with the use in aircraft manufacturers; is that  
18 correct?

19 A. Yes. The end user is the aircraft manufacturer.

20 Q. Were there any instances where F2C2 sold complete  
21 systems to aircraft manufacturers in the United States?

22 A. Excuse me. I missed the beginning.

23 Q. Sure. Have there been any instances where F2C2  
24 Systems has sold complete systems to aircraft manufacturers  
25 in the United States?

Hage - direct

1 A. Yes. Sorry. The first instance, amazing. It  
2 happened in Boeing Long Beach, which is the home of -- this  
3 is where the C-17 is assembled, as this is a plant for  
4 nationals to have access to it, defense protected.

5 So technical people there wanted to upgrade  
6 one of the riveting, the drilling machine they had for the  
7 floor to drilling and riveting, and they wanted to use the  
8 F2C2 system. So they went through a group in Michigan to  
9 purchase the system from us and install it on their machine  
10 to upgrade it.

11 Q. Now, how many cassettes has F2C2 sold in total?

12 A. It's around over 10,000, I would say.

13 Q. Okay. And do you know how many of those cassettes  
14 F2C2 sold to Broetje?

15 A. To Broetje directly, that would be in the area of  
16 3,000.

17 Q. Okay. Now, during the course of AHG or F2C2's  
18 relationship with Broetje, how much of F2C2's revenue came  
19 from Broetje?

20 A. At the peak period, I would say around 85,  
21 90 percent.

22 Q. And what was that revenue for?

23 A. The sale of complete cassettes, rack and load station  
24 systems.

25 Q. Now, are you aware of any cassette based feeding

Hage - direct

1 systems on the market?

2 A. No, except the one we mentioned, Broetje, none.

3 Q. Okay. Let me show you what has already been admitted  
4 into evidence as PTX-569. Now, do you recognize what has  
5 been marked as PTX-569?

6 A. Yes, I do.

7 Q. And what is that?

8 A. It's a cassette that has been put together by former  
9 U.S. rivet manufacturer called Huck Company.

10 Q. And was this Huck cassette system ever successful?

11 A. It never really took off the ground. It has been  
12 used to some extent and then it has been dropped.

13 Q. Okay. Do you know whether it is being used today or  
14 not?

15 A. Beg your pardon?

16 Q. Is it being used today?

17 A. No, it is not.

18 Q. Let me show you what has been marked as PTX-570. Do  
19 you recognize this cassette?

20 A. Yes, I do.

21 Q. And who makes this cassette?

22 A. This cassette is being made by ElectroImpact.

23 Q. And who is ElectroImpact.

24 A. ElectroImpact is a very large integrator in the U.S.

25 Q. Do you know whether the ElectroImpact cassette was

Hage - direct

1       used successfully in the industry?

2       A.       It has been used for a certain time on the machine,  
3       and in England I believe they were using it on a wing  
4       riveting machine for the MS3 plane.

5       Q.       Is it still being used today?

6       A.       No, it's not being used any more.

7       Q.       And what cassette based feeding system does  
8       ElectroImpact use today?

9       A.       ElectroImpact is using F2C2 System cassettes.

10      Q.       Do you know of any other companies that have tried to  
11      developed a cassette based feeding system?

12      A.       Quite a few actually. Over the time, you had Gemcore  
13      in the U.S. that tried to develop a cassette-based system,  
14      and Dassault company. Airbus tried as well. I can think of  
15      a company that is now, in fact, called Brohio (phonetic)  
16      were manufacturing customers and they tried to develop a  
17      cassette developing rivets.

18      Q.       Okay. Now, do you know whether any much these  
19      companies were successful with their cassette-based feeding  
20      systems?

21      A.       No, they dropped their attempt probably at pre-sales  
22      level.

23      Q.       And to the best of your knowledge, whose systems are  
24      these companies using today?

25      A.       Gemcor is using F2C2 System. Dassault is using F2C2



Hage - direct

1 System. Airbus is using F2C2 System on some of their  
2 machines.

3 Q. And what do they use it on the other machines?

4 A. Well, if they buy machines from Broetje, they would  
5 use the Broetje system.

6 Q. Now, when did F2C2 first discover that Broetje was  
7 manufacturing and selling its own cassette?

8 A. I think the first appearance.

9 MS. BEYER: Objection.

10 THE COURT: Is there an objection?

11 MS. BEYER: There is. Rule 602.

12 THE COURT: Do you have a response?

13 MR. LINDVALL: Well, I will lay a foundation.

14 THE COURT: Okay.

15 BY MR. LINDVALL:

16 Q. As part of your job, do you have an understanding --  
17 well, let me move on. We've heard Mr. Bornes talk about  
18 this. This is probably not a useful time.

19 Do you recall whether F2C2 ever discovered a  
20 cassette in France, a Broetje cassette?

21 A. In France, yes.

22 Q. Okay. When was that? Do you recall?

23 A. That was in October 2006, in Meaulte, at the area  
24 site which is to be called Airbus before they sold the  
25 company.

Hage - direct

1 MS. BEYER: Objection.

2 A. Just like Boeing sold Spirit.

3 THE COURT: The objection?

4 MS. BEYER: Rule 602 again, Your Honor.

5 MR. LINDVALL: I think it's too late. The  
6 witness answered the question.

7 THE COURT: I won't strike the answer, but do  
8 you have any more in this area?

9 MR. LINDVALL: No, Your Honor.

10 THE COURT: Move on then.

11 BY MR. LINDVALL:

12 Q. Now, what did F2C2 do after it learned about this  
13 cassette in France?

14 A. We took legal action in November.

15 MS. BEYER: Objection again, Your Honor. I'm  
16 sorry.

17 THE COURT: Same basis?

18 MS. BEYER: Rule 602, yes.

19 THE COURT: How about you ask him a few  
20 questions about whether he has a basis for these answers.

21 MR. LINDVALL: Okay.

22 BY MR. LINDVALL:

23 Q. Mr. Hage, are you familiar with Broetje cassettes?

24 A. I've seen some.

25 Q. And in your job as Vice President of F2C2, have you

Hage - direct

1 learned the history and the relationship between Broetje and  
2 F2C2?

3 A. You mean, how do you say? The association between  
4 the two companies?

5 Q. Yes.

6 A. Oh, yes. Yes.

7 Q. And are you aware that Broetje and F2C2 were  
8 competitors?

9 A. Since recent date, yes.

10 Q. Okay. Are you aware of the history in, for example,  
11 2006 and 2007 between Broetje and F2C2?

12 A. Yes, I am.

13 Q. Okay. And is that, when you have become aware of  
14 that history, was that in the normal course of your duties?

15 A. As part of it, yes. I'm involved in various  
16 litigation that are taking place.

17 Q. Now, Mr. Hage, do you know what F2C2 did after it  
18 discovered the cassette in France?

19 A. Took legal action.

20 Q. Okay. And do you know when it took that legal action?

21 A. November of 2008.

22 Q. Now, when did F2C2 first learn that Broetje was  
23 selling its own cassettes in the United States?

24 A. We learned about Broetje selling cassettes in the  
25 U.S. in September of 2007.

Hage - direct

1 Q. And that was after you joined the company; correct?

2 A. Yeah, that was after I joined the company. It was in  
3 Wichita, Spirit, where I sent the engineer, and seen some  
4 Broetje machine there.

5 Q. Now, once F2C2 realized that they had, Broetje had  
6 been selling in France, why didn't F2C2 then do an  
7 investigation in the United States?

8 MS. BEYER: Objection. Rule 602 again.

9 THE COURT: Overruled.

10 BY MR. LINDVALL:

11 Q. You can answer the question.

12 A. Okay. You know, aircraft manufacturer facilities  
13 aren't open to the public. You have security concerns of  
14 the confidentiality concerns. And before you are invited,  
15 you need to send a full copy of the passport so they can  
16 screen you, and you come in as invited.

17 Once you are invited, you come to meet the party  
18 you are going to do business with. And from security, you  
19 will be escorted to where you carry out your business. And  
20 if by any chance you can spot something that catches your  
21 eyes like something looking like your machine, you will see  
22 what I call a chance encounter. You are not allowed to roam  
23 the factory, to look at what they're doing and with what  
24 they're doing it with.

25 Q. And during this period of time from 2007 to 2008, did

Hage - direct

1 F2C2 employ any persons who were American citizens?

2 A. No.

3 Q. Now, once they made the discovery of Broetje selling  
4 the cassette in the United States, what did Broetje -- I'm  
5 sorry. Withdraw that question.

6 What did you do after you made the discovery  
7 that Broetje was selling cassettes in the United States?

8 A. We filed a suit against them.

9 Q. Okay. Do you recall when that started?

10 A. That started in May 2009.

11 Q. And that's why we're here today?

12 A. That's correct.

13 Q. Now, have there been any recent decisions by the  
14 French court relating to Broetje's cassette in litigation  
15 between the two companies?

16 A. There has been a French court ruling in December of  
17 2012.

18 Q. And have you seen the decision from the French court?

19 A. Yes, I have.

20 Q. And in the normal course of your business, is it part  
21 of your duty to understand these types of decisions?

22 A. Yes, it is.

23 Q. Why?

24 A. As I'm involved in litigation in France as well.

25 Q. But in your duties as Marketing, Vice President of

Hage - direct

1 Sales, is it there any reason for you to have an  
2 understanding of what is going on in litigation between the  
3 two companies?

4 A. Yes. When you have a favorable ruling from a court  
5 on writing your rights have been wronged, it's always useful  
6 to use it commercially, for example.

7 Q. Okay. And what is your understanding of the impact  
8 of the French decision on F2C2's business?

9 A. Well, it has done us a lot of good in term of people  
10 recognized that our system had been wronged and this ruling  
11 set things right again.

12 Q. And what is your understanding of Broetje's ability  
13 to sell cassettes today in France?

14 A. The ruling is preventing Broetje to market their  
15 cassettes on the French area.

16 MR. LINDVALL: Could we show the Exhibit  
17 PTX-613T, please? And I'd like to draw your attention to  
18 page 30. And if you could go from the fourth paragraph from  
19 the bottom, please.

20 BY MR. LINDVALL:

21 Q. Mr. Hage, have you seen this? Have you read this  
22 before?

23 A. Yes, I have seen this.

24 Q. Could you read this to the jury, please?

25 A. Yes, I can.

Hage - cross

1                   Maybe I will use that.

2       Q.       Sure.  It's PTX-613T, and it's page 30, dot 30.

3       A.       Page 30.

4       Q.       Yes.

5       A.       Thank you.

6                   If I read that paragraph.  "Stating that by  
7       copying in a servile manner, the appearance of the cassettes  
8       produced and commercialized by the companies AHG F2C2  
9       System, thus creating a risk of confusion with the  
10      activities of these two companies, Broetje Automation  
11      committed acts of unfair trading with regard to AHG and F2C2."

12                  MR. LINDVALL:  Thank you.  I have no further  
13      questions.

14                  THE COURT:  All right.  Cross-examination.

15                                  CROSS-EXAMINATION

16      BY MS. BEYER:

17      Q.       Good afternoon, Mr. Hage.

18      A.       Good afternoon, counselor.

19      Q.       People in the industry have known that F2C2 has  
20      accused Broetje of copying its cassettes since at least  
21      2008; isn't that correct?

22      A.       I'm sorry.  Could you repeat that question?  You go  
23      too fast at the beginning, please.

24      Q.       Sure.  People in the industry have known that F2C2  
25      has accused Broetje of copying its cassettes since at least

Hage - cross

1 2008; isn't that correct?

2 A. Yes, I think so.

3 Q. You told Boeing in 2008 that F2C2 was suing Broetje  
4 in France and that its next step was to initiate a legal  
5 action in the USA?

6 A. Yes, that's right.

7 Q. And you sent that e-mail to William Bankston at  
8 Boeing in June 2008?

9 A. Yes, I did.

10 MS. BEYER: May I approach the witness, Your  
11 Honor?

12 THE COURT: You may.

13 (Document passed forward.)

14 THE WITNESS: Thank you.

15 BY MS. BEYER:

16 Q. Mr. Hage, do you recognize this document?

17 A. Excuse me. I'm reading the other pages.

18 Yes.

19 MS. BEYER: Your Honor, I'd like to move into  
20 evidence Defendants' Trial Exhibit 1062.

21 MR. LINDVALL: No objection, Your Honor.

22 THE COURT: DTX-1062 is admitted.

23 MS. BEYER: Thank you.

24 (DTX-1062 admitted into evidence.)

25 BY MS. BEYER:



Hage - cross

1 Q. Mr. Hage, this is the e-mail you sent to Boeing in  
2 2008?

3 A. Yes, it is.

4 Q. And it is addressed to William Bankston?

5 A. Well, among others.

6 Q. And attaching copies of the legal action against  
7 Broetje?

8 A. That's true. You got to keep your customers  
9 informed.

10 MS. BEYER: I am finished with that exhibit,  
11 Jonathan. Thank you.

12 BY MS. BEYER:

13 Q. Mr. Hage, isn't it true Boeing has been using the  
14 ElectroImpact cassette-based feeding system in the United  
15 States for more than 15 years?

16 A. Isn't it true that Boeings has been using what  
17 cassette system?

18 Q. An ElectroImpact cassette-based rivet feeding system.

19 A. It's possible. It's in Boeing plant in Everett, if  
20 that's the case.

21 Q. And AHG and F2C2 have never sued ElectroImpact for  
22 infringe or trade redress, have they?

23 A. We have no reason to sue ElectroImpact for patent  
24 infringement. We only have to take a look at the cassette  
25 system. It has nothing to do with ours. It's different.

Hage - cross

1 The actual architecture is not the same as ours. They've  
2 tried. They used a system that has been working for some  
3 time that they have discontinued and it does not go against  
4 our interest.

5 Q. So AHG and F2C2 have never sued ElectroImpact for  
6 trade dress infringement based on PTX-570, the cassette we  
7 have been looking at?

8 A. Certainly not. It doesn't look like our cassette at  
9 all.

10 Q. Mr. Hage, you were aware of the decision in front of  
11 the Paris Court of Appeal that you were discussing with  
12 Mr. Lindvall is on appeal to the Supreme Court in France?

13 A. Yes.

14 MS. BEYER: Could we put you up Exhibit 613T,  
15 please? To page 25.

16 Can we highlight paragraph 1, please?

17 BY MS. BEYER:

18 Q. Mr. Hage, isn't it true that the Paris Court of  
19 Appeal stated the business relations between AHG and Broetje  
20 Automation GmbH had ceased as from 2001 and that AHG in no  
21 way demonstrated that the alleged termination was sudden,  
22 nor that it caused any prejudice to AHG?

23 A. This is an interesting question. But I think it  
24 has been in suit reviewing the pieces that have been  
25 communicated to you, especially the termination agreement

Hage - cross

1 that F2C2 received from your client in 2004 or 5, I believe.

2 Q. Mr. Hage, isn't it true that the Paris Court of  
3 Appeal found that AHG and Broetje Automation GmbH had ceased  
4 business in 2001 and that AHG had not demonstrated that the  
5 alleged termination was sudden or that it caused any  
6 prejudice to AHG?

7 A. What I can -- what you have seen from the graph  
8 demonstrated earlier on today, Big Business, Broetje  
9 Automation was around 2003. So we had a big, strong,  
10 growing commercial relationship at that time.

11 Q. Mr. Hage, that was F2C2, was it not? Not AHG.

12 A. Yes, it was F2C2.

13 Q. And the Court found that there no prejudice to AHG?

14 A. F2C2 and AHG are very intimately related because we  
15 belong to AHG and they run most of our administrative  
16 operation, like accounting.

17 Q. Could you take a look at paragraph 7, please?

18 A. (Witness complies.)

19 Q. Mr. Hage, isn't it true that the Paris Court of  
20 Appeal upheld the lower court decision dismissing F2C2  
21 claims for wrongful termination of business relations  
22 because F2C2 had failed to execute its contractual  
23 obligations by delivering defective products to Airbus that  
24 weren't made for more than a year?

25 A. With the Court's permission, I might have to develop

Hage - cross

1       that a little bit.

2                   THE COURT: Do you want a long or short answer?

3                   MS. BEYER: I'd like the short answer to start.

4       BY MS. BEYER:

5       Q.       Isn't it true that that is what the Court said?

6       A.       What happens is --

7                   THE COURT: Mr. Hage, do your best to answer the  
8       question that is asked.

9                   Why don't you ask the question again.

10       BY MS. BEYER:

11       Q.       Mr. Hage.

12       A.       Yes.

13       Q.       Your answer to the question is yes?

14       A.       Yes, it is.

15       Q.       And isn't it true that the Paris Court of Appeals  
16       also upheld the lower court's ruling that Broetje did not  
17       breach any obligation of confidentiality to AHG or F2C2?

18       A.       No, they did.

19                   MS. BEYER: Could we please look at page 26.

20       Let's highlight the third and fourth paragraphs, please.

21       BY MS. BEYER:

22       Q.       Mr. Hage, would you please read this?

23       A.       Considering that it has emerged, in contacting the  
24       two companies, Siemens, and SMC-Pneumatik, to manufacture a  
25       separator as claim by the frequent Patent No. FR 2 870 761

Hage - cross

1 (as it happens, cancelled for absence of novelty). Broetje  
2 Automation GmbH has not breached any obligation of  
3 confidentiality or loyalty likely to engage its  
4 responsibility.

5 Considering that the initial ruling which  
6 dismissed the claims served by the applicants against  
7 Broetje Automation GmbH for violation of contractual  
8 obligations, will therefore be upheld.

9 Q. Isn't it true that the Paris Court of Appeals did not  
10 breach any obligation of confidentiality to AHG or F2C2?

11 A. Well, I have to apologize but this is not my legal  
12 expertise. We are talking about patents.

13 Q. When you were talking to Mr. Lindvall, you explained  
14 that it was part of your job to be familiar with the court  
15 rulings and you seemed fairly familiar with the other  
16 portions. Is it just this portion that you are not familiar  
17 with?

18 A. No, I'm not familiar with this one. My involvement  
19 in the litigation has been mainly to unearth documents from  
20 the archive. And I did assist to the first ruling of the  
21 Paris court.

22 Q. Mr. Hage, in the German litigation concerning AHG's  
23 corresponding patent, three courts have ruled against AHG  
24 and in favor of Broetje, haven't they?

25 A. That's right.

Hage - cross

1 Q. And isn't it true that a German court found that  
2 Broetje had not infringed the European patent and that  
3 decision was affirmed by an appellate court?

4 A. That's the ruling.

5 Q. Isn't it also true that the German patent court  
6 recently ruled that the counterpart patent is invalid under  
7 German law in view of the Shinjo-Komaki references.

8 A. That is possible. I didn't read the ruling.

9 Q. You don't have any reason to disagree with that  
10 those?

11 A. No, I don't.

12 Q. Mr. Hage, isn't it also true that the German patent  
13 court reviewed the invalidity portion of the decision from  
14 the French Court of Appeals in favor of AHG and rejected it  
15 as unconvincing?

16 A. I told you I haven't read that ruling. So if it is  
17 written in the ruling, that is a yes.

18 Q. Mr. Hage, you testified that your primary customers  
19 in the United States included several integrators, including  
20 Gemcor and Kuka and ElectroImpact. Do these integrators  
21 also sell other fastener-feed systems besides F2C2's?

22 A. I can think of a few, yes.

23 Q. For example, Gemcor also sells vibratory belt  
24 systems?

25 A. Yes.

Hage - cross

1 Q. And ElectroImpact sells hopper systems?

2 A. That's right.

3 Q. And F2C2 currently has commercial relationships with  
4 the aircraft manufacturers Boeing, Gulfstream, and Sprint?

5 A. Currently being today?

6 Q. In the past five years.

7 A. Yes, I would say yes.

8 Q. And with Vought also?

9 A. Vought. No, it's far older than that.

10 Q. Mr. Hage, do you have any personal knowledge as to  
11 whether in the instance you were describing with Kuka and  
12 Broetje whether Kuka approached Broetje for a quote or it  
13 was the other way around?

14 A. This has been discussed with some Kuka personnel.

15 Q. You don't have any reason to -- if somebody from  
16 Broetje were to testify that Kuka approached Broetje and  
17 asked for a quote for the system, you wouldn't have any  
18 reason to disagree with them, would you?

19 A. I probably would not disagree with that.

20 Q. Mr. Hage, is it correct -- isn't it correct that AHG  
21 and F2C2 paid a royalty to Dassault for a period of time on  
22 the rack system?

23 A. This is true.

24 Q. And that royalty was for 15 percent; is that correct?

25 A. That's correct.

Hage - cross

1 Q. And F2C2 and AHG paid that royalty through at least  
2 2007; correct?

3 A. Correct.

4 MS. BEYER: Could I have slide 1, or PTX-129,  
5 please?

6 Your Honor, may I approach the witness?

7 THE COURT: You may.

8 THE WITNESS: Thank you.

9 (Document passed forward.)

10 BY MS. BEYER:

11 Q. Mr. Hage, you have seen this document before,  
12 correct?

13 A. Yes, I have seen this document. Of course.

14 Q. Would you please turn to page 129.30?

15 A. Will you repeat the number, please?

16 Q. Sure. 129.30.

17 A. Yes, I'm here.

18 Q. The cassette pictured on page 129.30 is a new recent  
19 version of F2C2's cassette; is that correct?

20 A. That is very correct.

21 MS. BEYER: May I approach the witness, Your  
22 Honor?

23 THE COURT: You may.

24 (Ms. Beyer approaches with cassette.)

25 THE WITNESS: Yes, that is one.



Hage - cross

1 MS. BEYER: I'll set it here. I don't want to  
2 break it.

3 The exhibit I placed over here is premarked as  
4 JTX-64B.

5 BY MS. BEYER:

6 Q. Mr. Hage, is this cassette the cassette shown in the  
7 photo on 129.30?

8 A. It's got a very similar look. It's probably the  
9 same.

10 MS. BEYER: Your Honor, I would like to move  
11 JTX-64B into evidence.

12 MR. LINDVALL: No objection.

13 THE COURT: It's admitted.

14 (JTX-64B is admitted into evidence.)

15 BY MS. BEYER:

16 Q. Mr. Hage, JTX-64B, this cassette was introduced by  
17 F2C2 within the past four years or so; is that correct?  
18 Five years?

19 A. Yes, that's the current generation.

20 Q. So this the cassette you sell today?

21 A. Yes.

22 MS. BEYER: Thank you. I have no further  
23 questions.

24 THE COURT: Okay. Redirect.

25 MR. LINDVALL: I have a couple questions, Your

Hage - redirect

1 Honor.

2 First, if we could put up PTX-613T, please.

3 You got that Jeff? PTX-613T? Good. If you can  
4 turn to page 30, please.

5 REDIRECT EXAMINATION

6 BY MR. LINDVALL:

7 Q. Now, you were shown some parts of this, and first  
8 this part right here we talked about earlier, Mr. Hage, the  
9 fourth paragraph on the bottom.

10 If you could highlight that, Jeff, please.

11 A. Yes, I read this portion.

12 Q. And this portion is where the French court found that  
13 Broetje had committed acts of unfair trading; correct?

14 A. Yes, that is correct.

15 Q. And that is based on copying in a servile manner the  
16 appearance of the cassettes; correct?

17 A. Correct.

18 Q. Okay. But if we could go to the fourth paragraph  
19 from the top, please.

20 And I don't believe we went over this paragraph,  
21 did we, with the jury? If you could read this paragraph to  
22 the jury, please.

23 A. Yes.

24 Stating that Broetje Automation committed acts  
25 of infringement with regard claims 1 to 7, 11 and 12 of the

Hage - redirect

1 French section of European Patent No. EP 0 373 685 to the  
2 detriment of AHG, AHG rivets and to Messrs. Jean-Marc Auriol  
3 and Phillippe Bornes, holders of the patent and to the F2C2,  
4 holder of an exclusive rights operating license for this  
5 patent.

6 Q. Now, I noticed that it says the F2C2 System is a  
7 holder of exclusive rights operating license for this  
8 patent; is that correct?

9 A. That is right.

10 Q. Is that in your understanding?

11 A. Yes, sir.

12 Q. Okay. Now, if you could, remember that they were  
13 told about two types of other feeding system, the vibratory  
14 bowl and a hopper system?

15 A. Yes.

16 Q. Are those substitutes for the AHG or the Broetje  
17 cassette-based feeding system?

18 A. It's one way to substitute. That is another way to  
19 feed rivets.

20 Q. Can they be interchangeable and have the same  
21 abilities?

22 A. No, the difference was the F2C2 and let's say the  
23 vibratory bowls is that they take a lot of real estate on a  
24 machine. They're open, and you can have some foreign  
25 objects falling into them and thus jamming the machine.

Hage - redirect

1           You cannot, it is not as versatile as the  
2           cassette system, but it is usable when you have a small  
3           rivet definition that does not carry a lot of references.

4           Then you have the hopper system which is more  
5           compact but still limited by a number of cartridges you have  
6           to use for each type of rivets, down here. So it multiply  
7           the cartridges by so many numbers.

8           MR. LINDVALL: Okay. Thank you.

9           No further questions.

10          THE COURT: All right. Thank you, Mr. Hage.  
11          You may step down.

12          THE WITNESS: Thank you.

13          (The witness hits microphone.)

14          THE WITNESS: Excuse me.

15          THE COURT: That's okay.

16          The plaintiff may call their next witness.

17          MR. LINDVALL: Your Honor, I'd like to call  
18          Dr. Harri Kytomaa please to the stand.

19          THE COURT: Okay.

20          ... HARRI KYTOMAA, having been first duly sworn,  
21          was examined and testified as follows ...

22          THE COURT: Welcome to you, Dr. Kytomaa.

23          THE WITNESS: Thank you.

24          MR. LINDVALL: May I approach?

25          THE COURT: You may approach, and you may

Kytomaa - direct

1 proceed when ready.

2 DIRECT EXAMINATION

3 BY MR. LINDVALL:

4 Q. Good afternoon, Dr. Kytomaa.

5 A. Good afternoon.

6 Q. Now, Dr. Kytomaa, would you please give us a summary  
7 of your education?

8 A. Sure. I received a bachelor's degree in engineering  
9 science from England in 1979.

10 After that, I started my graduate studies at  
11 CalTech or California Institute of Technology in 1980.

12 And I graduated with my master's degree there in  
13 1982 and my Ph.D. in mechanical engineering in 1986.

14 MR. LINDVALL: Your Honor, I forgot to give the  
15 transition statement, but it may be useful to do it right  
16 now for the jury.

17 THE COURT: Okay.

18 MR. LINDVALL: Dr. Harri Kytomaa is an  
19 experienced mechanical engineer who has been asked to study  
20 the technical aspect and provide his professional opinions.  
21 He is not an AHG or Broetje employee.

22 BY MR. LINDVALL:

23 Q. Now, Dr. Kytomaa, can you take a look at PTX-543,  
24 please, in your exhibit book?

25 A. (Witness complies.)

Kytomaa - direct

1 Q. And what is PTX-543?

2 A. It is a copy of my resume.

3 MR. LINDVALL: I move to admit.

4 MR. KELLEHER: No objection.

5 THE COURT: It's admitted.

6 (PTX-543 is admitted into evidence.)

7 BY MR. LINDVALL:

8 Q. Now, what was your Ph.D. thesis focused on, Dr.  
9 Kytomaa?

10 A. My Ph.D. thesis was focused on fluid mechanics and in  
11 particular, the motion of particular materials in the fluid.

12 Q. Can you give the jury an example what you mean by  
13 fluid?

14 A. Yes. Fluid mechanics within the field of mechanical  
15 engineering is considered to be the flow of gases and  
16 liquids. So in this context, air is a fluid.

17 Q. Do you have any experience in the aerospace industry?

18 A. I do.

19 Q. Can you describe that experience?

20 A. Yes. I've carried out quite a few projects in the  
21 context of the aerospace industry, including working on gas  
22 turbines or jet engines, specifically the design of the  
23 turbine blades and more specifically the fan blades that you  
24 see the front end of airplane engines.

25 I've also worked on the air circulation within

Kytomaa - direct

1 the cabin of very large aircraft as well as the design of  
2 fluid filled vibration dampeners used in engines, internal  
3 combustion engines of smaller aircrafts. So those are  
4 piston engines, and their crankshafts and the crankshafts,  
5 just like in a car, will actually experience vibration  
6 caused by the motion of the pistons. So these are specific  
7 devices that are designed to dampen those vibrations.

8 Q. Dr. Kytomaa, do you hold any professional licenses?

9 A. I do. I'm a certified professional engineer in  
10 several states: in California, Louisiana, Maine, Michigan,  
11 Massachusetts, New York, and Washington state.

12 Q. And what is your present occupation?

13 A. I am an employee of a company called Exponent.

14 Q. And what is your position with Exponent?

15 A. Well, I have three titles. I'm a Principal Engineer,  
16 which is a technical title. I also run our group, called  
17 Thermal Sciences. And I'm also Corporate Vice President,  
18 President of the firm.

19 Q. What is the business of Exponent?

20 A. Exponent is an engineering and scientific consulting  
21 company.

22 Q. How many employees does Exponent have?

23 A. Between 800 and 900.

24 Q. And how many of your work at Exponent is dedicated to  
25 testifying as an expert witness?

Kytomaa - direct

1 A. Quite a bit of my work is done outside of the context  
2 of any legal considerations. Probably more than half has  
3 nothing to do with litigation.

4 Q. Okay. What is your hourly rte, Exponent charges in  
5 this case?

6 A. \$495 an hour.

7 Q. Is that a fixed consulting fee?

8 A. It is.

9 Q. Do you personally receive this fee?

10 A. No, I wish I did.

11 Q. Are you paid on a fixed salary by Exponent?

12 A. I am. I am a full-time salaried employee.

13 Q. Is your income or salary dependent on the outcome of  
14 this litigation in any way?

15 A. No, it has nothing to do with it.

16 Q. Now, could you explain to the jury what you were  
17 asked to do?

18 A. Yes. I was asked to review the patents in this case,  
19 the patent prosecution history that you have already heard  
20 about as well as the Court's ruling on the meaning of the  
21 claims of the patent.

22 I was asked also to review the cassettes. So  
23 specifically the AHG and the Broetje cassettes.

24 In the course of my work, I also reviewed  
25 documents by AHG, some of which have been shown already here



Kytomaa - direct

1 as well as documents from Broetje.

2 I have also spoken with employees of AHG. And I  
3 performed my own inspection and testing at Gemcor of the  
4 operation of both AHG and Broetje cassettes.

5 Q. Now, you mentioned the Court's claim construction  
6 order. How did you use the claims, the Court's claim  
7 construction order in forming your opinions?

8 A. I used the Court's claim construction, which is  
9 really the Court's definition of the meaning of the words in  
10 the claims in interpreting the claims of the patent, which  
11 is how I then arrived at my own opinions as to whether there  
12 is infringement or not.

13 Q. Okay. You also mentioned that you reviewed the file  
14 histories of the AHG patents; is that correct?

15 A. Yes.

16 Q. Okay. If you could look at PTX-124 and PTX-125 in  
17 your book, please.

18 A. Yes.

19 Q. Are these the file histories of the two patents, the  
20 '216 patent and '339 patent which we have also been calling  
21 the AHG patents?

22 A. These are rather large documents but, yes, they  
23 appear to be the prosecution histories.

24 MR. LINDVALL: I move to admit PTX-124 and 125.

25 MR. KELLEHER: No objection.

Kytomaa - direct

1 THE COURT: They're admitted.

2 (PTX-124, PTX-124 admitted into evidence.)

3 BY MR. LINDVALL:

4 Q. Now, can you tell the jury generally what you  
5 concluded as a result of your analysis of the patents in the  
6 Broetje products?

7 A. Yes. So there are two elements really of the work I  
8 did. One was to look at infringement. The other one was  
9 validity. So in the context of infringement, I found that  
10 both the '216 and '339 patents were infringed upon by the  
11 Broetje products.

12 I also made a determination that AHG, the  
13 cassette made by AHG practices those same patents. And I  
14 also found that those patents are perfectly valid, so  
15 they're not invalid.

16 Q. Did you prepare any expert reports in this case?

17 A. I did.

18 Q. And can you explain how many?

19 A. Yes. So I issued four reports in this case. The  
20 first report was on the subject of infringement. Then my  
21 second report was on the subject of validity. And then I  
22 issued another two reports, supplemental reports responding  
23 to issues that have been raised by the other side.

24 Q. Now, who wrote your expert reports in this case?

25 A. I did with my colleague, Dr. Tim Morse who reports to

Kytomaa - direct

1 me.

2 Q. Now, I understand you prepared materials to aid you  
3 in your presentation today; is that correct?

4 A. Yes, I prepared two things really. A stack of  
5 PowerPoint slides as well as an animation to help explain  
6 elements of the patents.

7 Q. Okay. Now, what patents did you consider in  
8 rendering your opinions regarding the Broetje product?

9 A. So, I considered the '339 patent and the '216 patent  
10 that are shown on the screen.

11 Q. Okay. And what claims in particular are you prepared  
12 to testify about today in these two patents?

13 A. So on the '339, that's a method patent, I have  
14 address the claims 1, 2, and 6. And the '216 patent, the  
15 one on the right, is an apparatus patent. So it's an  
16 apparatus patent. There, I have looked at claims 1 and 2.

17 Q. Okay. And could you explain to the jury the general  
18 scope of these patents?

19 A. Yes. These are patents for the storage of objects  
20 that look like rivets or rivets inside tubes and for  
21 dispensing those rivets using compressed air.

22 Q. Now, can you explain to the jury what a rivet is?  
23 And they have heard this term many times.

24 A. Sure. Yes, a rivet is like a fat nail that is blunt  
25 at the end, and it is used to fasten mechanical objects.

Kytomaa - direct

1 Those objects, particularly think of two metal plates. A  
2 hole is drilled through the two plates and the rivet is  
3 inserted. Then it is compressed and deformed to now hold  
4 the two metal sheets together.

5 Q. Okay. And do you know what the focus of these two  
6 patents, the '216 and '339 is?

7 A. Yes. The focus of the patents is the use of  
8 passageways or grooves to allow air past the rivets and to  
9 arrive all the way to the first rivet, to allow it to be  
10 dispensed.

11 MR. LINDVALL: Your Honor, I know different  
12 jurisdictions have different requirements, but I would like  
13 to offer Dr. Kytomaa as an expert in mechanical engineering.

14 THE COURT: Is there any objection to that?

15 MR. KELLEHER: No, Your Honor.

16 THE COURT: All right. He is so recognized as  
17 that.

18 BY MR. LINDVALL:

19 Q. Now, can you explain to the jury what the purpose of  
20 grooves and passageways are?

21 A. Yes. The purpose of the grooves or passageways on  
22 the inside of the tube is to overcome the problem of  
23 jamming. The problem of jamming arises when you place many  
24 rivets in side a tube and try to dispense them with  
25 compressed air. The passageways or the grooves allow the

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1 air to pass past the rivets, to arrive at the very first  
2 rivets, and to allow those to be dispensed, overcoming the  
3 problem of jamming.

4 Q. Now, have you prepared anything to show the jury this  
5 concept?

6 A. I have. I have an animation as well as some images  
7 that I will show later on.

8 Q. Is this an animation that you actually prepared?

9 A. Yes, I prepared that. We have our own animators that  
10 help people like me describe concepts.

11 MR. LINDVALL: If we could put up PDTX-80,  
12 please.

13 BY MR. LINDVALL:

14 Q. And if you need it to be stopped, you will just have  
15 to tell Jeff.

16 A. Yes. So rivets have an axis, just I'm showing here,  
17 just like the axis of a top, for example. And if you place  
18 a single rivet in a tube, which is the prior art that was  
19 something that was known already, into a circular tube,  
20 there is really no difficulty in passing that down the tube  
21 using compressed air.

22 But in the presence of many rivets in a circular  
23 tube, now the problem arises that they jam. And so, here,  
24 that's what this picture is showing.

25 So the invention of the '339 and the '216

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1 patents, the two patents, have grooves that are shown here,  
2 and those grooves allow the passage of air past the many  
3 rivets and allow the air to transport the rivets forward as  
4 the air flows.

5 And, here, I will show the motion of the rivets.  
6 That is intermittent, and the reason it is intermittent is  
7 there are stop members at the end of the tube that allow the  
8 passage of one rivet at a time.

9 Q. Thank you. Now, Dr. Kytomaa, in the course of  
10 forming your opinions -- you can take that down.

11 In the course of forming your opinions, did you  
12 gather an understanding of what a cassette-based rivet  
13 distribution system is?

14 A. Yes.

15 Q. And what is it?

16 A. Yes. The system really comprises of three  
17 components. One is the loading type station, loading  
18 station, where the cassettes are loaded. Then the cassette  
19 itself. And then racks into which the cassettes are placed  
20 to then deliver rivets to a robot or a machine that does the  
21 riveting.

22 Q. Okay. Now, let's go through the components of the  
23 cassette-based rivet distribution system. Have you created  
24 any slides for that?

25 A. I have. I have images of that.

Kytomaa - direct

1                   So here you can see a vibratory bowl. And you  
2                   can see it's actually -- I hope you can see this better than  
3                   I can. The light is not very good. But there is a spiral  
4                   that rises on the left side going towards, away from the  
5                   photographer, and as this bowl vibrates, the rivets rise up  
6                   on that ramp and then ultimately come up to the right of the  
7                   vertical blue stripe at a station where the orientation of  
8                   the rivet is detected optically and rivets that are oriented  
9                   incorrectly are rejected and thrown back into the bowl.

10                  So that's the loading station. They're  
11                  specifically showing the bowl. And on the right-hand side  
12                  actually, that machine on the right-hand side is the AHG  
13                  loading station.

14                  Q.       Now, what is in the next slide?

15                  A.       So this is an image of the AHG cassette that you have  
16                  seen many of already. And inside the tube, you will see  
17                  that there are rivets.

18                  Q.       Is this a tube filled with rivets right here?

19                  A.       That's correct.

20                  Q.       And you see the rivets in this tube?

21                  A.       Yes. And they are aligned in the direction of the  
22                  length of the tube.

23                  Q.       Typically, how many rivets may be in one of these  
24                  cassettes?

25                  A.       Thousands of rivets. It depends on the size of the

Kytomaa - direct

1 tube, but up to thousands of rivets.

2 Q. And what is on your next slide? What is this?

3 A. So this is the third component that I mentioned.

4 That is, racks. So you have already seen photographs of the  
5 racks in various manuals, but these are the racks into which  
6 the cassettes go.

7 On the left-hand side, you see an AHG cassette  
8 in the rack, and there are no other cassettes, it's just  
9 one.

10 And on the right-hand side, you can see two AHG  
11 racked side by side, and you can see at the top the blue  
12 labels read "AHG" with a multitude of cassettes in the racks.

13 Q. These photographs we're looking at, did you take  
14 these photos?

15 A. I took these photographs. I took these photographs  
16 during my Gemcor inspection in Buffalo, Upstate New York.

17 Q. Why did you visit Gemcor?

18 A. I wanted to perform testing of both the Broetje and  
19 the AHG cassettes to see them in operation and to see how  
20 they performed.

21 Q. Now, what other ways of feeding rivets to a  
22 cassette-based rivet distribution machine exists?

23 A. So there are two other methods you already heard  
24 about. One I just showed you, the vibratory bowl. The  
25 other is a hopper method.



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1           The hopper, really all it is is think of a  
2           container that allows the rivets to flow downward by  
3           gravity, often by the aid of vibration as well. So those  
4           are the two or methods of feeding rivets, vibratory bowls  
5           and hoppers.

6           Q.       Are there any advantages associated based with the  
7           cassette-based rivet distribution system as opposed to these  
8           other ways of feeding rivets?

9           A.       Yes. First of all, the cassette-based system allows  
10          you to feed rivets fast to the riveting robots, saving time  
11          associated with manufacturing.

12                 But also, as you saw from the rack just there,  
13          the rack can be filled with many types of rivets, and so the  
14          riveting machine can then very quickly select one from one  
15          robot to another for purposes of manufacturing.

16                 The other very important aspect of the use of  
17          cassettes is that once you have oriented and placed the  
18          rivets inside the cassette, they are prevented from falling  
19          out, on the one hand, but also foreign objects cannot enter  
20          the cassette. And that is one of the problems associated  
21          with the other technologies.

22           Q.       And what role does the cassette play in the  
23           cassette-based rivet distribution system you just described?

24           A.       Well, the cassette is really the heart of the system.  
25           It's the main component of the system. It is loaded at the

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1 loading stations, and then it is the cassette that you place  
2 into the racks. So it is the critical working component of  
3 the system.

4 Q. And what role does the grooved tube that you talked  
5 about earlier that are described in the patents play in the  
6 cassette?

7 A. The grooved tube allows you to, on the one hand,  
8 store a large number of rivets, larger than was possible  
9 with a circular tube without a groove, and then to dispense  
10 those using compressed air.

11 Q. Now, how do the cassettes, racks, and loading  
12 machines operate together?

13 A. They operate as one functional unit. They're one  
14 system.

15 Q. Now, Dr. Kytomaa, have you had an opportunity to  
16 observe a Broetje cassette-based rivet distribution system?

17 A. Yes.

18 Q. Okay. And is that with Gemcor that you just  
19 described to the jury?

20 A. That's correct.

21 Q. Now, I'm going to show you, Dr. Kytomaa, what has  
22 been marked as JTX-3. Do you recognize this?

23 MR. LINDVALL: May I approach, Your Honor?

24 THE COURT: You may approach.

25 (Cassette passed forward.)

Kytomaa - direct

1 BY THE WITNESS:

2 A. Thank you.

3 Q. Do you recognize this?

4 A. Yes, I do.

5 Q. What is it?

6 A. This is a Broetje cassette.

7 Q. Okay. Did you study this cassette in the course of  
8 forming your opinions?

9 A. Yes, I have.

10 Q. Okay. Is there anything else you studied in forming  
11 your opinions besides the cassette?

12 A. Yes. I mean I've also used the cassettes with the  
13 loading station as well as a rack.

14 Q. Okay. So do you actually took this cassette and  
15 inserted it into a loading station and a rack?

16 A. Yes.

17 Q. And did you watch it in operation?

18 A. Yes, I did that. Yes.

19 Q. Now, did you memorialize your observations that you  
20 made at Gemcor?

21 A. Yes. During of the course of my inspection, I took  
22 over 100 photographs and also shot some video of the  
23 cassettes in operation.

24 MR. LINDVALL: Okay. We'd like to show some  
25 video right now. If we could bring up PTX-117, please.

Kytomaa - direct

1 BY MR. LINDVALL:

2 Q. First, can you describe this first video? What is  
3 this?

4 A. Yes. So here, this is a close-up actually of the  
5 tubes that you can see also in this cassette. The tubes.  
6 And you can actually read Broetje on the side of the tubes.  
7 And you can see that there are rivets that are arranged in  
8 the direction of the length of the tube, and that they're  
9 progressing one rivet dimension at a time, in an  
10 intermittent manner.

11 Q. The little metal, are these the rivets, the cylinders  
12 you see?

13 A. Those are the rivets.

14 Q. And each of those are contained in one tube; is that  
15 right?

16 A. That's right. There, you can see something like the  
17 top 5, but my estimation is that there might be about, that  
18 is, 20 revolutions or so of that tubing in that cassette.

19 Q. Now, let's look at the next video you took and  
20 explain to the jury what this video is of.

21 A. Yes. So in this image, this is also a Broetje  
22 cassette in operation in a rack. So what I'm doing here,  
23 and I'm sorry for the noise but I'm looking at the  
24 dispensing end that is dispensing the rivets. And you can  
25 see the rivets that are coming out one at a time, and you

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1 can also see at the top left there are these actuated  
2 elements. Those are the stop members that actually allow  
3 one rivet to exit while trapping the next rivet that is  
4 then ready to be released in its turn.

5 Q. And these are the rivets being released to the rivet  
6 machine?

7 A. That is correct. So this end here is the dispensing  
8 end that we're looking at on the screen. And these are  
9 the stop members that you can see working intermittently  
10 together.

11 MR. LINDVALL: I'd like to move into evidence  
12 PTX-177.

13 MR. KELLEHER: No objection.

14 THE COURT: All right.

15 (PTX-177 is admitted into evidence.)

16 THE COURT: And I think now is a good time for  
17 our afternoon break --

18 MR. LINDVALL: It would be a good time.

19 THE COURT: -- for the jury.

20 Ladies and gentlemen of the jury, no talking  
21 about the case during the break. We'll get you back here  
22 shortly.

23 (Jury left courtroom.)

24 THE COURT: All right. We will be in recess.

25 (Brief recess taken.)

Kytomaa - direct

1                   \*           \*           \*

2                   (Proceedings reconvened after recess.)

3                   THE COURT: Bring the jury back in.

4                   (Jury returned.)

5                   THE COURT: Welcome back. We are ready to  
6 proceed.

7                   You may have a seat, Doctor.

8                   THE WITNESS: Thank you.

9                   THE COURT: You may proceed.

10                  MR. LINDVALL: Thank you.

11 BY MR. LINDVALL:

12 Q.           Dr. Kytomaa, I forgot to ask you a question when we  
13 talked about your qualifications. Do you recall?

14 A.           (Nodding yes.)

15 Q.           I forgot to ask you, have you ever been a professor?

16 A.           Yes.

17 Q.           Where were you a professor?

18 A.           Yes. After I graduated from graduate school in  
19 California Institute of Technology, I was a professor at  
20 MIT or Massachusetts Institute of Technology in Mechanical  
21 Engineering.

22 Q.           How long were you a professor?

23 A.           Eight years.

24 Q.           Now, we were just talking about the Broetje cassette;  
25 correct?

Kytomaa - direct

1 A. Yes.

2 MR. LINDVALL: May I approach, Your Honor?

3 THE COURT: Yes.

4 BY MR. LINDVALL:

5 Q. Let me show you a cassette. The videos you were  
6 taking, they were taken at Gemcor that we just saw; correct?

7 A. Yes, that's correct.

8 Q. And you also did some testing, similar testing with  
9 the AHG cassette like you have in your hand?

10 A. Yes. I tested both AHG and Broetje cassettes.

11 Q. Okay. When you were at Gemcor, did the cassette  
12 look like the cassette you have there for the AHG?

13 A. Yes.

14 Q. And did that cassette have some markings on it, some  
15 tape or whatever around the back and the sides? Did you  
16 have an understanding what that was for?

17 A. Yeah. Yes. I mean these cassettes are manufactured  
18 with sheet metal, and the sheet metal is manufactured  
19 elsewhere and then sent to the location of manufacturing of  
20 the cassettes, and the sheet metal itself is protected by a  
21 piece of tape.

22 But I can show you, you can just peel this tape  
23 off just like this. This is strictly a protective layer  
24 both with the shipping of the sheet metal to AHG and for  
25 protecting the cassettes in transportation when they are

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1 ultimately supplied to the enduser.

2 Q. Thank you. (Mr. Lindvall takes the cassette back.)

3 Now, Dr. Kytomaa, earlier you stated you were  
4 prepared to offer opinions concerning the infringement of  
5 claims 1, 2, and 6 of the '339 patent, and 1 and 2 of the  
6 '216 patent?

7 A. Yes.

8 Q. And what are those opinions again?

9 A. That the Broetje cassette claims 1, 2 and 6 of the  
10 '339 patent.

11 Q. What is your understanding of the law of infringement?

12 A. The law requires that infringement occurs when all  
13 elements of any one claim are all satisfied by the product  
14 or the allegedly infringing product. When that happens,  
15 there is infringement.

16 Q. During your analysis, what burden of proof did you  
17 apply?

18 A. So, legally, the burden of proof is by a  
19 preponderance of evidence. So what that means is that AHG  
20 has a burden to show that it is more likely than not that  
21 Broetje infringes on the patents.

22 Q. Now, let's move to the '339 patent, please. And the  
23 first part of claim 1 of the '339 patent.

24 First of all, could you describe briefly what  
25 this is, what you see on this slide, PDTX-024?



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1 A. Yes. So the claims of the patent are the numbered  
2 paragraphs at the end of the patent. This is the first  
3 numbered paragraph, and this is, it is the claims that  
4 define the bounds of the invention. So this is the first  
5 claim.

6 Q. So let's go through each element of the claims. So  
7 each claim is made of a number of elements?

8 A. Yes.

9 Q. And we can show how each element is found in the  
10 Broetje cassette; is that correct?

11 A. Yes. Just to be clear for the jury. So here you  
12 have a claim and so for a product infringement claim, the  
13 product has to meet every element of this claim. And there  
14 are many elements that I will go through here.

15 Q. Okay. Now, what is the first part of claim 1 of the  
16 '339 patent?

17 A. So it is a process for dispensing identical pieces  
18 having a symmetry of revolution about an axis. And I have  
19 already shown you that rivets, for example, have a symmetry  
20 of revolution about an axis.

21 Q. And how does the Broetje cassette meet this element?

22 A. Well, Broetje uses their cassettes with rivets that  
23 have an axis.

24 Q. What is the next element of claim 1?

25 A. So here is -- I apologize here. This is, I added

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1 this just to show the rivets have an axis. Yes.

2 Q. And this is a depiction of a rivet you see here?

3 A. That is a rivet, and you can see the axis.

4 Q. Okay. It uses the term "a symmetry of revolution."

5 Can you explain to the jury what is meant by symmetry?

6 A. Yes, and I showed that with the animation, but  
7 essentially if you turn the rivet about its axis, it looks  
8 the same in every angle.

9 Q. Would you give an analogy?

10 A. Yes. It's like a top. Mentioned earlier if you spin  
11 a top, it looks the same at all time. It spins about its  
12 own axis.

13 Q. Can you turn to the next slide, please. And what is  
14 the next element of the claim?

15 A. So this is -- and I will read: Providing a tube  
16 having a hollow center and a shape corresponding to the  
17 transverse section of the greatest diameter of the pieces  
18 for assuring a peripheral guiding of said pieces at the  
19 level of this section.

20 Now, this element of the claim was interpreted  
21 and a definition of this was provided by the Court. And  
22 here's the Court's construction. So, and I -- and I have in  
23 quotations here, first, the piece from the highlighted  
24 yellow section and I will read: Shape corresponding to the  
25 transfers section of the greatest diameter of the pieces

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1 means the shape of the hollow center of the tube is  
2 compatible with the greatest diameter of the pieces.

3 Q. All right. Just to make sure the jury is clear, the  
4 Court's definition of this claim language is what follows  
5 the means; is that correct?

6 A. Right. So the shape corresponding to the transfers  
7 sections language that I just took from, you can see  
8 starting there, that's just a direct quotation of an element  
9 of the claim and then the Court's interpretation is the  
10 italicized.

11 Q. And is the Court's interpretation you followed in  
12 forming your opinions?

13 A. Yes, that's correct.

14 Q. Let's go to the next slide, please.

15 A. And here's an image showing that the tube has a  
16 hollow center.

17 Q. And then let me stop you for a minute.

18 A. Sure.

19 Q. What does this slide depict, first of all?

20 A. So the, the -- there are three things here. First at  
21 the top is the element of the claim that we're talking about  
22 using the Court's definition, so I've just inserted there at  
23 the top in the text.

24 The bottom left is an image that has been  
25 provided by Broetje in their own responses to

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1     interrogatories. So legal brief, a legal document, they  
2     provided this image.

3             And on the right I simply help, I created this  
4     diagram to help understand the hollow center that is  
5     described in the language up top.

6     Q.       All right. So how does Broetje's cassette meet this  
7     particular element of claim 1 of the '339 patent?

8     A.       So clearly the tube has a hollow center, and the  
9     shape of the hollow center is compatible with the greatest  
10    diameter of the pieces, but in the images that you saw of  
11    the Broetje cassette operating, clearly, the two are  
12    compatible. Otherwise, the two wouldn't work.

13    Q.       What is your understanding of compatible as being  
14    used there? How did you use it?

15    A.       Well, the compatibility is such that, and you can  
16    read on, actually. It says, for assuring a peripheral  
17    guiding of the pieces at the level of this section. So they  
18    have to be compatible so that the rivet can move inside the  
19    tube and is guided by the walls of the tube.

20    Q.       Turn to the next element of claim '339. What is this  
21    element?

22    A.       Arranging the pieces one after another in the  
23    interior of the tube two with their axes of revolution  
24    extending along the longitudinal axis of said tube. And  
25    this tube was interpreted and defined by the Court.

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1                   And the Court's construction of this  
2                   language highlighted in yellow is the following: Pieces  
3                   inserted one after another with their axes of revolution  
4                   extending in the direction of the length of the tube.

5           Q.       Okay. Now, how does Broetje's cassette meet this  
6                   element?

7           A.       When the pieces are arranged in the tube of the  
8                   Broetje cassette, they are arranged with their axes of  
9                   revolution extending in the direction of the length of the  
10                  tube.

11          Q.       Okay. And --

12          A.       So here is what I, what I've done here is I have two  
13                   images that are also from, from Broetje document. If you  
14                   could do the following, please, controlling the images. If  
15                   you can actually make bigger the six images at the very  
16                   bottom left of the document, the six.

17          Q.       These right here?

18          A.       Yes. Can you make those bigger, because I just want  
19                   to explain, this is from a Broetje document.

20          Q.       And just for the record, it says JTX-9?

21          A.       Yes.

22          Q.       All right.

23          A.       Yes. So as you can see in this particular Broetje  
24                   document, you see many tubes, six tubes with various kinds  
25                   of rivets aligned and they're all arranged in an orientation

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1 of their axis that goes along the length of the tube. All  
2 right?

3 And then what I did was to take one of those  
4 images, this one here, and I just sort of cleaned it up.  
5 Okay? So you can see the rivets outlined in the orientation  
6 of the direction of the tube.

7 Q. Okay. Let's go to the next element.

8 A. And feeding one end of said tube with a compressed  
9 fluid for assuring the transfer of the pieces toward an open  
10 dispensing end of said tube, admitting the compressed fluid  
11 into the one end of the tube behind the piece closest to  
12 said one end of the tube.

13 And I also have an image for that and so here is  
14 the Broetje cassette. So this is my photograph of the very  
15 Broetje cassette you saw a video of and you'll recognize  
16 the top right, you'll see the top members there. I had a  
17 close-up of that very area (indicating).

18 And so the first thing you see is that during my  
19 inspection, the rivets were aligned in the orientation of  
20 the length of the tube. You can see that by just looking at  
21 the tube. And that with respect to this specific element,  
22 the compressed air is admitted at the top left end. You can  
23 see the label.

24 And the rivets move counterclockwise in this  
25 coil, the coil two, and are ultimately dispensed at the top

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1 right end in accordance with the opening and closing of the  
2 stock methods.

3 Q. And you had the video earlier you showed the jury  
4 where you actually saw that at Gemcore in your testing?

5 A. Yes. I mean, this, this cassette is installed in a  
6 rack and I operated the rack and I show a video of the top  
7 right-hand corner. In fact, you saw two videos of this.

8 Q. Okay. Can we go to the next element, please, the  
9 last element of the '339 patent.

10 A. Distributing the fluid along the length of the tube  
11 through at least one longitudinal passageway on the internal  
12 surface of said tube and opening into the hollow center  
13 thereof for exerting the pressure of the fluid along the  
14 hollow center in the spaces (E) between the pieces, to the  
15 piece (1P) closest to the dispensing end on which said  
16 pressure acts for assuring the transfer toward the  
17 dispensing end.

18 I know this is an enormous mouthful, but I  
19 will explain. So I have a slide that explains this. So  
20 what this element speaks to is at least one longitudinal  
21 passageway, and I've shown in this image at the top and the  
22 bottom the passageways, longitudinal passageways, and the  
23 longitudinal passageways allow air to enter the gaps in the  
24 rivets. That's where the red arrows show. And ultimately  
25 allowing air to pass all the way to the leading rivet that

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1 is also dispensed by the compressed air.

2 Q. And did you observed the Broetje cassette meeting  
3 this element?

4 A. Yes.

5 Q. And is that shown in your earlier videos?

6 A. Yes. The two videos. Essentially, the video that  
7 showed the rivets moving in the tube bundle as well as the  
8 close-up close to the dispensing end that you saw.

9 Q. By the way, the Broetje cassette that you used, the  
10 tube, what was the shape of the cross-section of that tube  
11 that you observed?

12 A. It was, it was pentagon.

13 Q. If we can go to the next slide.

14 A. That's a, that's a shape with five sides.

15 Q. So do you have an opinion as to whether the Broetje  
16 cassette infringes the claim of, that claim 1 of the '339  
17 patent?

18 A. Yes. So just to complete it now, all of the elements  
19 of the claim 1 and it's very clear to me that the Broetje  
20 product, cassette, meets every element, every single element  
21 of claim 1. And we're done with claim now. I'm going to  
22 move on to 2 and then 6.

23 Q. Okay. Let's look at claim 2.

24 Now, first of all, could you explain to the jury  
25 what's meant by, a process as in claim 1? This is called a



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1 dependent claim; is that correct?

2 A. Yes. So a dependent claim always starts with, a  
3 process for an apparatus as in. A process as in claim 1  
4 means that, that the process that we just went through is  
5 really what we're talking about here. Okay? And then some  
6 additional detail that I will go into.

7 Q. This is an additional limitation to all the other  
8 limitations or elements that you just went through; is that  
9 correct?

10 A. Yes. And just as -- just to explain, claim 1 talked  
11 about at least one longitudinal passageway. All right. And  
12 so this sort of builds upon that.

13 Q. Okay.

14 A. So let me -- let me read. So this is quoted again:  
15 A process as in claim 1, and including distributing the  
16 compressed fluid -- can you go back one slide? I'm not  
17 sure.

18 Yes, okay. Let me read -- I will read either.  
19 A process as in claim 1, and including distributing the  
20 compressed fluid along the interior of a plurality of linear  
21 grooves, and many linear grooves, arranged about the hollow  
22 center.

23 Q. Okay.

24 A. And so here you can see the same photograph that  
25 was taken by Broetje, showing a rivet inside a Broetje tube,

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1 and you can see the orthogonal shape of the interior of the  
2 tube. And my schematic there shows the hollow center with  
3 the dotted line and the five grooves around the hollow  
4 center.

5 Q. And, again, the source of this picture is from  
6 PTX-128; is that correct?

7 A. Yes. I mean, that's, that's my recollection. I  
8 don't remember the exact number of the, of the document.

9 Q. You saw the document?

10 A. I saw the document, and it was a Broetje document.

11 Q. Can we go to the next slide, please. And this is  
12 claim 6 of the '339 patent; correct?

13 A. Yes.

14 Q. And what is new or what's the additional element in  
15 claim 6?

16 A. So this is a dependent claim 1 on claim 1. It's a  
17 process in claim 1 and including pretty narrowly orienting  
18 the pieces in the tube, so orienting the pieces inside the  
19 tube like you saw them with stop members 3 and 4 provided at  
20 the end of the tube and withdrawing the stop member situated  
21 at the dispensing end for assuring the dispensing.

22 Q. Now, is this claim limitation met by the Broetje  
23 cassette?

24 A. It is. The -- I've showed you already -- well, first  
25 of all, the preliminary orienting the pieces is shown in

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1 there, in Broetje's own materials, as you can see on the  
2 image here, and then those pieces are then controlled by  
3 stock members that I showed you a video of on the Broetje  
4 cassette.

5 Q. Okay. So the video that you showed the jury also  
6 supports this thing, claim element; is that correct?

7 A. Yes. The video specifically showed the stop members  
8 in operation. I mean, when you look at a cassette, you'll  
9 see them stationary. You don't see them alternating, and  
10 ultimately allowing the rivet to be dispensed, but with a  
11 movie, you can see the rivet.

12 Essentially, what you have is two stop  
13 members. The leading one traps the rivet and then when that  
14 opens up, it releases the rivet without letting the one  
15 behind it pass. Then it closes and allows the, the one  
16 before pass, and so on.

17 Q. All right. So what is your conclusion with respect  
18 to claims 1, 2 and 6 of the '339 patent and the Broetje  
19 product?

20 A. That the Broetje product infringes claims 1, 2 and 6.

21 Q. All right. Now let's move to the next patent, the  
22 '216 patent. And could you describe to the jury what this  
23 is?

24 A. Yes. So this is an apparatus patent. '339 was a  
25 method patent. This is an apparatus patent. And the first

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1 element of it reads, an apparatus for orienting identical  
2 pieces, comprising at least one tube having a hollow center  
3 for housing and guiding a plurality of said pieces aligned  
4 one after another.

5 Q. Okay. How does the Broetje cassette meet this  
6 element?

7 A. So the, the Broetje cassette is an apparatus. It  
8 accepts pieces that are oriented and it accepts identical  
9 pieces and it has a tube. The tube has a hollow center, and  
10 I showed that on the far right, that houses and guides many  
11 of these pieces that are outlined one after another.

12 Q. Okay.

13 A. So it meets this element.

14 Q. Now, the photos you have on this slide, PDTX-416,  
15 where's the one on the far left? Where is that taking  
16 you?

17 A. So I took that photograph at my inspection and this  
18 is a Broetje tube. If you were able to, to magnify this  
19 image, you would be able to read Broetje on there, and it  
20 has rivets inside.

21 Q. Okay. And the cassette here is a Broetje cassette  
22 (indicating)?

23 A. Yes.

24 Q. At the center? And what is on the right?

25 A. This is a Broetje tube.

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1 Q. Let's go to the next element of claim 1 and 2. What  
2 is that?

3 A. At least one groove arranged on the internal surface  
4 of the tube in such a manner as to open into the hollow  
5 center along the length thereof.

6 Q. Okay. How does the Broetje cassette meet this  
7 element?

8 A. So here again, you see the same photograph and I show  
9 five grooves, so that satisfies the, the -- that requirement  
10 of at least one groove. And all of these five grooves, if  
11 you look at any ONE groove, it has approximately a  
12 triangular shape and it opens into the hollow center of the  
13 tube. And you can see in the Broetje photograph there, I  
14 labeled with a, with a yellow arrow the groove.

15 Q. Let's move to the fourth element of claim 1. What is  
16 that?

17 A. And stop members 3, 4 situated at the ends of the  
18 tube for retaining the pieces.

19 Q. Okay. Does the Broetje, how does the Broetje  
20 cassette have this element?

21 A. So at the dispensing end, there are stop members.  
22 We've already talked about those. Now, those are the ones  
23 you see on the left of this image and, in fact, the close-up  
24 image looking into the, into the tube shows the little black  
25 lines there that are labeled stop members. So that's at the

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1 dispensing end.

2 And at the end where the compressed air is  
3 supplied, the stop member that prevents or contains the  
4 rivets within the cassette is a cap that is screwed onto the  
5 end that normally accepts the compressed air.

6 Q. So let's move to the next element of claim 1 of the  
7 '216 patent. What is that element?

8 A. Said tube being filled with said pieces comprising  
9 rivets arranged in a column.

10 Q. All right. And how does the Broetje cassette have  
11 this element?

12 A. Well, the entire intent of the Broetje cassette is to  
13 fill the tube with rivets and their marketing materials show  
14 that and we've already seen video that I shot that shows  
15 that as well.

16 Q. All right. Let's move to the final element of claim  
17 1 of the '216 patent. What is that element?

18 A. Said rivets having heads such that the transverse  
19 cross-section of the heads correspond to the transfers  
20 cross-section of the tube, and such that the cross-sectional  
21 area of the heads substantially equals the cross-sectional  
22 area of the tube excluding the at least one groove. There's  
23 a typo. That o-n should be one.

24 Q. Okay. And there's this term substantially equals.  
25 There is a definition or a Court construction of what this

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1 limitation is?

2 A. Yes. The Court has interpreted this particular  
3 element and I have it here. So, first, I -- yes. So let me  
4 read through it.

5 So this is the Court's interpretation: The  
6 shape of the head of the rivet is compatible with the shape  
7 of the hollow center of the tube. Remember, the hollow  
8 center was the sort of larger circle that you can inscribe  
9 inside the tube. Such that the cross-sectional area of the  
10 head of the rivet is of sufficient size as compared to the  
11 cross-sectional area of the hollow core. So the rivet has  
12 to be big enough is what it says. Such that there is  
13 sufficient space between the rivet and the surface of the  
14 hollow core. So what that means is, but there has got to  
15 be enough space between the rivet and the whole center of  
16 the tube. To permit the rivet to move without difficulty  
17 from upstream to downstream as a result of the compressed  
18 fluid.

19 Q. Okay. Now, how does the Broetje cassette meet this  
20 element?

21 A. So I've highlighted the key components here, because  
22 I understand there's a lot of text here. But the shape of  
23 the head of the rivet has to be compatible with the head of  
24 the hollow center ultimately to permit the rivet to move  
25 without difficulty from upstream to downstream. And that is

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1     what the Broetje cassette does. I mean, the shape of the  
2     rivet is compatible with the Broetje tube and it does move  
3     without difficulty from upstream to downstream.

4     Q.     And did you --

5     A.     By means of compressed air. I'm sorry.

6     Q.     Sorry. Did you observe that in the video that you  
7     had?

8     A.     I did. I mean, I observed it and then I documented  
9     it.

10    Q.     Okay. And would you rely on PTX-128?

11    A.     Yes. I chose this particular image because we all  
12    agree that this is a Broetje tube and rivet.

13    Q.     All right. If we could go to claim 2 of the '216  
14    patent. Again, because this is a dependent claim that  
15    contains all the elements you've just gone through and then  
16    adds one element; is that correct?

17    A.     Yes.

18    Q.     And what is the additional element it adds?

19    A.     This is, again, a dispensing apparatus as in claim 1,  
20    and wherein said tube includes a plurality of said grooves  
21    arranged about its hollow center. So the claim 1 had at  
22    least one groove. This claim says there are many grooves.

23    Q.     Okay. And how did Broetje's cassette meet this  
24    limitation?

25    A.     So this shows just as you saw a moment ago. You can



Kytomaa - direct

1 see five grooves. That's a plurality of grooves. That's  
2 many grooves.

3 Q. Okay. And if we go to the next. Cassette  
4 comparison. If we go back one more, please.

5 Now, do you have an opinion that the Broetje  
6 cassette infringes claim 1 of the '216 patent?

7 A. Yes.

8 Q. And what is that opinion?

9 A. It does.

10 Q. Okay. And with respect to the -- we discussed  
11 infringement of the patents by Broetje's cassettes so far;  
12 is that correct?

13 A. Yes.

14 Q. All right. Is there any way to use a cassette  
15 without infringing it?

16 A. Yes.

17 Q. And how?

18 A. There are two ways: Either by knowingly selling --

19 Q. Well, let me back up. Listen to my question. Is  
20 there any way to use a cassette without infringing it?

21 A. No. No. I mean, using the cassette infringes the  
22 very claims that we've gone through.

23 Q. All right. Did you reach an opinion as to  
24 contributory infringement?

25 A. Yes.

Kytomaa - direct

1 Q. Okay. And what is your understanding of contributory  
2 infringement?

3 A. So contributory infringement is to sell an infringing  
4 product in the U.S., knowing that there are -- it has patent  
5 protection.

6 Q. Okay. And knowing it does not have any substantial  
7 noninfringing uses?

8 A. That's correct.

9 Q. Okay. In your opinion, does the Broetje cassette  
10 have any substantial noninfringing uses?

11 A. No. It has -- I mean, the point here, just to be  
12 clear, is that the only other feeding systems are the  
13 hoppers that we talked about and those are not alternatives.  
14 Those have their own issues that the invention overcomes.

15 Q. Now, did you reach an opinion as to infringement by  
16 inducement?

17 A. Yes.

18 Q. And what is your understanding of induced  
19 infringement?

20 A. So induced infringement is to induce another party to  
21 infringe upon the patent by practicing the method of  
22 specifically here, the '339 patent as a method patent.

23 Q. Did you reach a conclusion with respect to that?

24 A. Yes.

25 Q. What is your conclusion?

Kytomaa - direct

1 A. Coy my conclusion is that Broetje did induce others  
2 to infringe, and so there is induced infringement.

3 Q. Okay. Let me show you what has been marked as  
4 PTX-168 in your book. And what is PTX-168?

5 A. PTX-168 is the Broetje instruction manual.

6 Q. Okay.

7 MR. LINDVALL: I move to admit this exhibit.

8 MR. KELLEHER: No objection.

9 THE COURT: It's admitted.

10 (PTX-168 was admitted into evidence.)

11 BY MR. LINDVALL:

12 Q. Okay. And what is the purpose of PTX-168, this  
13 instruction manual?

14 A. So this instruction manual instructs the owner of, of  
15 a Broetje fastener feed system, so the feed system really is  
16 three things: Loading station, the cassettes and the racks  
17 on how to operate the system.

18 Q. All right. Now, if an operator follows this  
19 instruction manual, is it your opinion that the '339 patent  
20 would be infringed?

21 A. Yes.

22 Q. Now, let me show you JTX-54 and ask you what that is.  
23 JTX-54.

24 A. That is Broetje's maintenance manual.

25 MR. LINDVALL: I move to admit JTX-54.

Kytomaa - direct

1 MR. KELLEHER: No objection.

2 THE COURT: It's admitted.

3 (JTX-54 was admitted into evidence.)

4 BY MR. LINDVALL:

5 Q. All right. What's a maintenance manual for?

6 A. It is to -- for owners of the Broetje system to  
7 maintain that system.

8 Q. Now, what is your opinion on whether Broetje induces  
9 infringement of the asserted claims of the '339 patent?

10 A. They do. They do induce infringement.

11 Q. Okay. Now, what alternatives were there to using  
12 cassettes with the invention described in the '339 and '216  
13 patent?

14 A. There were none.

15 Q. Okay. And would a hopper system be an acceptable  
16 alternative?

17 A. No.

18 Q. Why not?

19 A. It has all sorts of problems. First of all, you  
20 heard a lot already about the dangers of associated with  
21 foreign materials getting into the laboratory bowl that then  
22 may cause problems.

23 Secondly, it does not allow riveting at the  
24 same speed, does not give the flexibility of being able to  
25 change from one rivet to another rivet type. You have to

Kytomaa - direct

1 recognize that these roadblocks, the riveting machines are  
2 very sophisticated machines that can operate fast, and the  
3 vibratory bowl just does not accommodate the high accuracy  
4 and speed of those rivets.

5 Q. Okay.

6 A. And the same is true with the hoppers as well.

7 Q. Thank you.

8 MR. LINDVALL: I'd like to move for admission,  
9 counsel just reminded me, of JTX-9.

10 MR. KELLEHER: No objection, Your Honor.

11 THE COURT: Okay. It's admitted.

12 MR. LINDVALL: PTX-543.41 through 50. It's a  
13 C.V.

14 MR. KELLEHER: No objection.

15 THE COURT: Admitted.

16 (PTX-543.41 through 50 were admitted into  
17 evidence.)

18 MR. LINDVALL: PTX-128, which is the  
19 interrogatory. And we will agree to just take the portion  
20 in there that relates to this.

21 MR. KELLEHER: Yes, Your Honor. No objection to  
22 that.

23 THE COURT: No objection?

24 MR. LINDVALL: We will take out the questions  
25 that don't relate to the opinion in the interrogatory

Kytomaa - cross

1 response.

2 THE COURT: Okay. It's admitted.

3 (PTX-128 was admitted into evidence.)

4 MR. LINDVALL: And PTX-103. That, Your Honor,  
5 that's something that's a claim construction order. It's  
6 not the decision.

7 MR. KELLEHER: No objection to the order.

8 THE COURT: It's admitted.

9 (PTX-103 was admitted into evidence.)

10 MR. LINDVALL: And just to clear this up, what I  
11 showed you earlier, the AHG cassette with the protective  
12 tape covering on it was JTX-64B, 64B as in boy. Okay?

13 (JTX-64B was admitted into evidence.)

14 Thank you, Your Honor. No further questions.

15 THE COURT: Okay. Cross-examination.

16 CROSS-EXAMINATION

17 BY MR. KELLEHER:

18 Q. Hello again, Dr. Kytomaa. How are you?

19 A. Hello, sir.

20 Q. When you were at MIT, how many classes in rivet feed  
21 technology did you teach?

22 A. We did not have a class on rivet feed technology, but  
23 we had a class that I taught at the undergraduate, graduate  
24 level on fluid mechanics that is part and parcel of  
25 technology.

Kytomaa - cross

1 Q. And how many rivet feed systems have you designed?

2 A. I've not designed any.

3 Q. And how many have you repaired?

4 A. I'm not a repair technician.

5 Q. Do you feel that your learning in the field of fluid  
6 dynamics is transferable over to the field of rivet feeding?

7 A. Absolutely, from the standpoint of being able to  
8 analyze the invention associated with the '339 and the '216  
9 patents. Yes, sir.

10 Q. Now, a little while ago, you opined or, that is, gave  
11 the opinion that the "substantially equal" limitation of the  
12 '216 patent is satisfied. Did you do any measurements or  
13 calculations to come to that conclusion?

14 A. What I did was to take the Court's interpretation of  
15 that language and then to apply that interpretation that I  
16 have already shown you to make a determination as to whether  
17 the Broetje product as well as the AHG product meet that  
18 element of the claim. That's what I did.

19 Q. So that means you did not do any measurements or  
20 calculations?

21 A. But it was not necessary because the Court's  
22 interpretation specifically does not require any measurements.

23 Q. Okay. And you're familiar with the prosecution  
24 history of the '216 patent; correct?

25 A. Yes. To some extent, yes.

Kytomaa - cross

1 Q. So you are aware that the "substantially equal"  
2 limitation was added by the Examiner as a requirement to  
3 grant the patent?

4 A. Oh, that may be. I don't have any immediate  
5 recollection of that.

6 Q. But you would agree that the '216 patent requires a  
7 close relationship of the tube and the rivet head such that  
8 the tube is only slightly larger than the rivet head?

9 A. What the '216 patent, specifically the element that  
10 you talk about, requires is the shape of the head of the  
11 rivet is compatible with the shape of the hollow center to  
12 allow the rivet to move without difficulty from upstream to  
13 downstream. And this is a court document issued by the  
14 United States District Court, sir.

15 MR. KELLEHER: Your Honor, I would like to play  
16 a portion of Dr. Kytomaa's deposition.

17 THE COURT: Tell us where it is.

18 MR. KELLEHER: Page 133, lines 21 to 24.

19 THE COURT: Do you have it on video?

20 MR. KELLEHER: Yes, Your Honor.

21 THE COURT: You may play it.

22 (Video shown without audio, but text attached to  
23 bottom of screen.)

24 THE COURT: I assume we have audio with it, too.

25 MR. KELLEHER: We're working on that, Your



Kytomaa - cross

1 Honor.

2 "Question: But you say that the patents teach a  
3 tube of only slightly larger cross-sectional area than the  
4 head of the rivet, right?

5 "Answer: Yes. Correct."

6 MR. KELLEHER: Now, Dr. Kytomaa, I wonder if my  
7 opposing counsel would be good enough to put up slide 39 of  
8 Dr. Kytomaa's presentation.

9 THE COURT: I'm sure they would.

10 BY MR. KELLEHER:

11 Q. Okay. So, Dr. Kytomaa, what you have done there is  
12 you have drawn this pentagon, and I call that a proper sharp  
13 pentagon with points; right?

14 A. Yes, that is a pentagon. Yes.

15 Q. Whereas the Broetje tube is actually a bit softer at  
16 the five points; isn't that true?

17 A. Yes, I would agree with that.

18 Q. And you have drawn a dashed imaginary circle touching  
19 at five points on the pentagon?

20 A. Yes.

21 Q. And you call the inside of that a hollow center?

22 A. Yes.

23 Q. Isn't it true that there is nothing in either of  
24 these two patents about drawing imaginary circles?

25 A. That's actually incorrect.

Kytomaa - cross

1 Q. Where in the world is that in the two patents?

2 A. Okay. If I may read.

3 Q. Yes.

4 A. So I'm reading from column 4, line 32 -- 31.

5 This apparatus comprises cylindrical tube having a  
6 hollow central core, 2a, of a cylindrical form, the diameter  
7 of which is adapted to that of the largest cross-sectional,  
8 cross-section of the rivets to be distributed in such a manner  
9 as to contain the rivets and to guide them on their periphery  
10 with a play of several tenths of a millimeter.

11 So there are two words there that are  
12 unambiguous with respect to the circular character of the  
13 image that I have shown. One is that the central, hollow  
14 central core has a cylindrical form, and the second is that  
15 it has a diameter.

16 THE COURT: Which patent were you reading from,  
17 Doctor?

18 THE WITNESS: I'm reading from the '216 patent,  
19 column 4, line 31.

20 THE COURT: Thank you.

21 BY MR. KELLEHER:

22 Q. On the left there is a rivet in one of Broetje's  
23 tubes; isn't that right?

24 A. Say that again, please?

25 Q. On the left, there is a rivet inside one of Broetje's

Kytomaa - cross

1 tubes?

2 A. Yes.

3 Q. Okay. And so you are saying that the circle on the  
4 right that you have drawn is equivalent to the largest  
5 diameter of that rivet head?

6 A. The circle that I have drawn is the largest diameter,  
7 maximum diameter that you could accommodate in such a tube.

8 Q. Okay. But that is not what Broetje does. They use a  
9 much smaller rivet; isn't that true?

10 A. The Court's construction -- let me read that again  
11 because I think it's important for the '216 patent on this  
12 very section -- reads: The transverse cross-section of the  
13 head corresponds to the transverse cross-section of the tube  
14 such that the cross-section area of the head -- I'm sorry.  
15 I'm actually reading the wrong document.

16 The shape of the head of the rivet is compatible  
17 with the shape of the hollow center of the tube such that  
18 the cross-sectional area of the head of the rivet -- which  
19 is the, you can see here, is of sufficient size as compared  
20 to the cross-sectional area of the hollow core, so the rivet  
21 is big enough; and I continue -- such that there is  
22 sufficient space between the rivet and the surface of the  
23 hollow core. So there is enough space between the tube to  
24 permit the rivet to move without difficulty from upstream to  
25 downstream as a result of the compressed flow.

Kytomaa - cross

1                   So there is two things that are required by the  
2 Court's construction. One is that the head be big enough  
3 but that there also be enough space so that the rivet can  
4 move without difficulty.

5       Q.       And there is nothing in the Judge's claim construction  
6 about drawing imaginary circles.

7       A.       I'm using the language from the patent specification,  
8 which is the body of the patent that speaks both in the '216  
9 and the '339 of the largest diameter that the two could  
10 accommodate.

11      Q.       Now, the portions of the pentagon that you have  
12 designated as being grooves.

13      A.       Yes.

14      Q.       The shank of the rivet, the more narrow part than the  
15 head, that can actually fit into the portions you have  
16 described as the grooves, can't it?

17      A.       Not really.

18      Q.       Why not?

19      A.       I mean it depends on the exact diameter of the shank,  
20 but the radius of the groove that I have labeled there is  
21 smaller. That is, it's some sort of a narrower dimension  
22 than a typical radius of a shank. But obviously rivets vary  
23 in exact size.

24                   MR. KELLEHER: John, can you pull up Exhibit  
25 No. 1 for the '216 patent? Can you go one more page

Kytomaa - cross

1 forward?

2 BY MR. KELLEHER:

3 Q. So, Doctor, here in Figure 1 of the '216 patent, that  
4 depicts a column of rivets; is that right?

5 A. Yes.

6 Q. And here in these, the shank of the rivet is only  
7 about half the diameter of the rivet head; is that right?

8 A. I wouldn't come to that conclusion. I'd say it's a  
9 little less than that in this image, but I haven't measured  
10 it. I mean to be specific, I haven't needed to measure it  
11 because that doesn't come to play in the dimensions.

12 Q. But if a rivet of those dimensions was put into  
13 Broetje's tube, the shank would fall into the areas you have  
14 described as the tubes?

15 A. I don't know. I mean this is a patent schematic, so  
16 I -- and the patent itself doesn't speak about that at all,  
17 so I don't know.

18 Q. With regard to the '339 patent and the stop member  
19 element and also with regard to the '216 patent and its stop  
20 member elements, the claims talk about withdrawing the stop  
21 member before the rivets are dispensed; is that right?

22 A. Yes.

23 Q. And in Broetje's product -- I don't have the proper  
24 one here. In Broetje's product, the actuators that are at  
25 the end of the tube and inside the cassette, they go back

Kytomaa - cross

1 and forth like this (indicating), right? As the rivets come  
2 out?

3 A. Yes.

4 Q. So they stay integrated into the cassette; right?

5 A. No, the stop member actually that performs the  
6 stopping does get out of the way of the rivet. Otherwise,  
7 it wouldn't work.

8 Q. It gets out of the way of the rivet, you said. But  
9 it stays integrated as a part of the cassette?

10 A. Yeah. I mean it is, yes. It's a part of the  
11 cassette, and it gets out -- it steps out of the way of the  
12 rivet for purposes of dispensing, that's correct.

13 Q. But it's not detached from the cassette itself?

14 A. The dispensing end is not detached, that's correct.

15 Q. You mentioned that there is a problem with round  
16 tubes jamming; is that correct?

17 A. If you --

18 Q. Actually, the rivets jamming in the round tubes.

19 A. Right. Right. Yes, I described that and I showed an  
20 animation of that. Yes.

21 Q. Are you aware that a number of the cassettes that my  
22 client Broetje has sold in the United States have a round  
23 tube rather than a pentagonal tube?

24 A. I have heard that, yes.

25 Q. Do you know whether those round tubes experience

Kytomaa - cross

1 problems with jamming of the rivets?

2 A. If the round tube were long enough, I expect that  
3 they would.

4 Q. Have you tested it with any of Broetje's cassettes to  
5 see if they have that problem?

6 A. No, I have not tested them. And as you heard me  
7 speak before, the jamming issue arises when you have many  
8 rivets, a large number of rivets, above 500 or so. And I'm  
9 not -- I don't know exactly what cassettes Broetje sells  
10 that have round tubes. I have actually not seen them or  
11 inspected them, but what I do know is that if the cassettes  
12 are designed to deliver larger diameter rivets in which case  
13 only a smaller number of rivets would fit into the cassette,  
14 then to me it would make sense that those particular  
15 cassettes may not have the jamming problem.

16 Q. Also, Doctor, I should ask, you mentioned that there  
17 that this invention helps prevent, I'm sorry, allows one to  
18 use a large number of rivets; is that correct?

19 A. That's correct.

20 Q. There is no element of any of these claims that  
21 limits these claims to a particular number of rivets, is  
22 there?

23 A. No, not at all, although in practice, as you know,  
24 in industry, the two main players, Broetje and AHG are  
25 perfectly happy to practice that with long tubes.

Kytomaa - cross

1 Q. But even using three rivets could potentially  
2 infringe these claims; is that correct?

3 A. The number of rivets does not enter into the claim,  
4 the element analysis. And we have gone through all of the  
5 elements and we didn't talk about a number of rivets. All  
6 we talked about is the invention. So I would say, yes,  
7 you're right. That is, the number of rivets doesn't matter  
8 with respect to whether a certain product infringes or not.

9 Q. So even three could be enough plurality of pieces to  
10 infringe?

11 A. Well, recognize that the '216 is an apparatus patent  
12 and the apparatus patent does not talk about the number;  
13 right? So it certainly would infringe even with three. And  
14 the method patent also doesn't say anything about the number.  
15 The benefits are really the situation where the numbers of  
16 rivets is large.

17 Q. And we were speaking a moment ago about circular  
18 tubes. You don't contend that circular tubes are covered by  
19 any of the claims of the two patents, do you?

20 A. That's correct. The circular tubes don't have  
21 grooves or passageways. That's correct.

22 MR. KELLEHER: Thank you, Your Honor. That's  
23 everything.

24 THE COURT: Redirect?

25 MR. LINDVALL: No, Your Honor. No redirect.



Ellis - direct

1 THE COURT: Okay. Doctor, you may step down.

2 Thank you.

3 Plaintiffs may call their next witness.

4 MS. SHARP: Your Honor, plaintiffs next witness  
5 is Douglas Ellis. He has been asked to study financial and  
6 other data to give testimony on the subject of damages and,  
7 specifically, the profits that AHG has lost as a result of  
8 Broetje's conduct as well as the extent to which Broetje has  
9 been unjustly enriched as a result of its wrongful conduct.

10 THE COURT: Okay. Thank you. Mr. Ellis.

11 ... DOUGLAS ELLIS, having been first duly sworn,  
12 was examined and testified as follows ...

13 THE COURT: Welcome, Mr. Ellis.

14 THE WITNESS: Thank you.

15 MR. HOROWITZ: May I approach, Your Honor?

16 THE COURT: You may.

17 (Binders passed forward.)

18 THE COURT: You may proceed.

19 DIRECT EXAMINATION

20 BY MS. SHARP:

21 Q. Good afternoon, Mr. Ellis.

22 A. Good afternoon.

23 Q. Can you describe, please, for the jury, your formal  
24 education?

25 A. Yes. I have a bachelor's degree of finance from

Ellis - direct

1 Brigham Young University, a law degree from Washington  
2 University in St. Louis, and an MBA from the University of  
3 Pennsylvania.

4 Q. What sort of topics did earning those degrees require  
5 you to study and master?

6 A. I studied accounting, economics, statistics,  
7 marketing, research, writing, things like that.

8 Q. Have you put to use your specialized formal education  
9 in finance and law and business administration into use in  
10 your career?

11 A. Yes. I do that every day in the job that I do.

12 Q. And what is the job that you do?

13 A. I'm a business consultant and advisor. I value  
14 intellectual property like patents and trade secrets and  
15 things like that for companies and in litigation.

16 Q. And just to be clear, can you describe for us what  
17 you mean by intellectual property matters?

18 A. Sure. Intellectual property is the stuff that we're  
19 talking about here. We all got a crash course in what a  
20 patent is. Patents, trade secrets, invention, even designs,  
21 those are the intellectual property that I value.

22 Q. What percentage of your professional time is devoted  
23 to matters involving intellectual property issues?

24 A. More than 90 percent.

25 Q. Over the course of your career, how many intellectual

Ellis - direct

1 property matters have you worked on?

2 A. Over a hundred.

3 Q. And did any of those cases involve the aerospace  
4 industry?

5 A. Yes. I've done some work on airline industry  
6 reservation systems. I've done work on aircraft engine  
7 technology. And, of course, this case, so I have some  
8 understanding of the industry.

9 Q. Have you been recognized as an expert in intellectual  
10 property issues in Delaware courts before today?

11 A. Yes. In the Delaware Court of Chancery.

12 Q. Can I ask that you turn, please, in your witness  
13 binder to JTX-55.

14 A. Yes.

15 Q. Do you recognize that document?

16 A. I do. It's my resume.

17 MS. SHARP: Your Honor, this was the subject of  
18 agreement with counsel, so I ask that we publish it to the  
19 jury.

20 MR. CAHR: That's okay, your Honor.

21 THE COURT: All right. If there's no objection,  
22 it's admitted. I mean, do you want it admitted also?

23 MS. SHARP: Yes, sir, I do. Thank you.

24 MR. CAHR: And that's fine, Your Honor.

25 THE COURT: Okay. Admitted and published.

Ellis - direct

1 (JTX-55 was admitted into evidence.)

2 BY MS. SHARP:

3 Q. We'll just page through this, but let me ask you  
4 generally to describe to the jury what this document is.

5 A. This basically includes my relevant work experience  
6 and education.

7 Q. And this might go without saying, but you are not  
8 providing your expertise here for free; is that correct?

9 A. That's right. My firm bills me at an hourly rate of  
10 \$425 an hour, and I have a staff that help me at rates from  
11 \$90 to about \$625 an hour.

12 Q. Is your pay based in any way on the outcome of this  
13 litigation?

14 A. It is not.

15 Q. Where do you work?

16 A. I work at Duff & Phelps. I'm a managing director in  
17 their intellectual property practice.

18 Q. And how long have you been at Duff & Phelps?

19 A. Since August 2008.

20 Q. So let me turn, then, to more specifics about this  
21 case. What did you do in this case?

22 A. In this case, I analyzed, I think a list will pop up  
23 here, but I analyzed about 15,000 pages of documents  
24 produced by both Broetje and AHG. Inside that pile of  
25 documents was data, marketing stuff, e-mails, pictures. I

Ellis - direct

1 analyzed various industry publications.

2 I performed my own independent research. I  
3 toward Gemcore's Buffalo facility. We heard about Gemcore.

4 I interviewed outside accountants for AHG and,  
5 among other things, you see there, I filed, summarized my  
6 findings and calculations and filed two expert reports in  
7 this case.

8 Q. So let's focus for just a moment on the reports that  
9 you filed. Were those reports accompanied by attachments  
10 that described exactly what it was that you evaluated here?

11 A. Yes. Those attachments summarized my findings.

12 Q. Can you turn first, please, to JTX-56.

13 A. Yes.

14 Q. And I am focusing specifically on pages 54 through  
15 96.

16 MS. SHARP: Your Honor, I would move the  
17 admission of JTX-56 as it was the subject of agreement as  
18 well.

19 MR. CAHR: That's okay, Your Honor.

20 THE COURT: Okay. It's admitted.

21 (JTX-56 was admitted into evidence.)

22 BY MS. SHARP:

23 Q. You also have the document in front of you. Can you  
24 describe, please, what the attachments are very generally?  
25 If we page through JTX-56 at page 54, 55, 56 and continuing

Ellis - direct

1 on and on, what are we seeing in these lists?

2 A. These are the documents -- this is basically the pile  
3 of 15,000 documents, or pages that I looked through. I  
4 basically make a list of everything I received, reviewed, or  
5 relied upon.

6 Q. Now, if we stop for just a moment, in this list,  
7 each of these documents begins with AHG. What does that  
8 mean?

9 A. These are documents produced by AHG. We call those  
10 Bates numbers. They have a stamp on them so we can  
11 reference the document that we are using.

12 Q. And what generally were they? What generally were  
13 these documents?

14 A. Again, all kinds of things. They included numbers,  
15 data, sales, pictures, the brochures that we saw earlier,  
16 all kinds of things.

17 Q. And if we jump forward to JTX-56 at page 92, is that  
18 closer to the end of the list of things that you reviewed  
19 after 42 pages?

20 A. It looks like it.

21 Q. There, some of the documents are preceded by the  
22 initials BN. What are those documents?

23 A. Those are Broetje documents.

24 Q. So --

25 A. They were the same way AHG documents. They come from

Ellis - direct

1 Broetje, so they have their number on them.

2 Q. And your list continues by including in the next  
3 pages JTX-56.93 and later some additional categories of  
4 information. What are those categories of information?

5 A. Again, we capture some of the independent research  
6 that we did. There's some case law that we used that's  
7 relevant for damages, deposition testimony, things like  
8 that.

9 Q. All right. Now, did you recently supplement your  
10 original report?

11 A. I did. I received updated financial information  
12 because my first report was filed in 2011 and we just  
13 updated the numbers through the end of 2013.

14 Q. Let me ask you to turn to PTX-621.

15 MS. SHARP: And, Your Honor, I would move the  
16 admission of PTX-621 based on counsel's agreement.

17 MR. CAHR: Your Honor, our agreement is that all  
18 of the attachments for both of these will be included and  
19 all actually they don't appear to be all included, both of  
20 these, but subject to that --

21 THE COURT: I'm not sure. Is there an  
22 objection?

23 MR. CAHR: Yes. I object unless they're  
24 included. If they are included, I'm fine with that.

25 MS. SHARP: We're happy to include them. There

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1 may have been a copying error in the notebooks.

2 MR. CAHR: Thank you.

3 THE COURT: Subject to that.

4 (PTX-621 was admitted into evidence.)

5 BY MS. SHARP:

6 Q. So PTX-621.

7 A. Sure.

8 Q. Focusing on that document, is that your supplemental  
9 report?

10 A. These are the attachments to my supplemental report.

11 Q. And to be clear on where we were, this is a series of  
12 calculations you did more recently because you received  
13 updated financial data; is that right?

14 A. That's right. It brings the stuff I did before up to  
15 current.

16 Q. Do those attachments also include pages that  
17 show calculations and tabulations of the data that you  
18 reviewed?

19 A. Yes. It -- there aren't that many pages here, but it  
20 summarizes a ton of work.

21 Q. And, in addition to the work that is summarized, are  
22 there also charts that show calculations as attachments to  
23 your report?

24 A. Yes. Most of these show calculations.

25 Q. And if we can just stay on this topic until we see it



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1 through to the end.

2 Can you point us to a specific page of Exhibit  
3 PTX-621 that is an example of a calculation you did and  
4 describe, just call out the number and describe for us how  
5 you did the calculations by year.

6 A. Sure. Let's look at Attachment 5.

7 Q. And what's the number in the bottom right of  
8 attachment five?

9 A. 621.30.

10 Q. And if we can have 621.30.

11 A. So the numbers are really tiny, but what I've done  
12 here is from 2003 to 2013, I counted up all of the Broetje  
13 unit sales of systems that we're talking about here, the  
14 Automated Fastener Feed System. And to do that, if you look  
15 down at the bottom at sources, this stuff was scattered  
16 everywhere, so we had to pour through the documents and find  
17 them. And so this reflects maybe the hardest part of work  
18 that we did, and that's finding what was sold and counting  
19 it out.

20 Q. Is it correct that your calculations were done year  
21 by year by year so that there's a total for each year?

22 A. That's correct. That's how we did it.

23 Q. And without going through each one of these small  
24 print documents, would it be fair to say that this is a good  
25 example of one of your summary calculations and the

Ellis - direct

1 calculations that you did year by year?

2 A. Yes, it is.

3 Q. Okay. I think we understand now what you looked at  
4 in order to formulate your opinions, so I'm going to ask you  
5 simply, first, to summarize your opinions and conclusions,  
6 and then we'll step back and work through them in a bit more  
7 detail.

8 What did you calculate in this case?

9 A. In this case, I calculated lost profits for Broetje's  
10 infringement of AHG's patents. I also calculated -- and  
11 the number is up there and that's \$2,099,943 for the period  
12 2003 through December 7, 2009. That's when the patents  
13 expired.

14 I also calculated, if I can go to the next one,  
15 the amount of damages associated with the other claims.  
16 That's the trade dress infringement, unfair competition,  
17 that stuff. And Broetje's unjust enrichment is \$12,411,632.  
18 And lost profits associated with these claims amount to  
19 \$3,109,769.

20 Q. You've identified two categories of damages  
21 basically, a category for patent infringement and a category  
22 for the other claims, what we're generally referring to as  
23 copying claims. Are those two measure of damages, lost  
24 profits in the first instance and unjust enrichment in the  
25 second duplicative?

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1 A. Lost profits in the first instance is a measure of  
2 the harm to AHG. So the amount that you mean to make AHG  
3 whole, put them back where they were if the infringement  
4 hadn't happened. On the unjust enrichment side, that's a  
5 different measure. That's a measure of the benefit to  
6 Broetje. So the idea is that the wrong-doer shouldn't  
7 benefit from the wrongdoing. So what I did was I measured  
8 that benefit and you give away those ill-gotten gains.

9 Q. Before we go into a little bit more detail about the  
10 calculations, let's be clear about what you did not  
11 calculate. Did you do any calculation relating to punitive  
12 damages which are requested here?

13 A. I did not. None of these numbers here have anything  
14 to do with what I call punishment. My measures are  
15 different than that.

16 Q. And why did you not calculate punitive damages?

17 A. As I understand it, that's not my job. The Judge  
18 will instruct the jury on how to do that.

19 Q. Let's turn, then, to the first element of your  
20 calculation, so the first category, lost profits, and  
21 talk a little bit about the actual number crunching that  
22 you did.

23 I think you've already described to us that  
24 these are profits that AHG would have made but for Broetje's  
25 infringement; is that right?

Ellis - direct

1 A. That's right. In the absence of Broetje's  
2 infringement, these are the profits AHG would have made,  
3 yes.

4 Q. And if we could turn to slide 94. Can you walk us  
5 through how a damages expert such as yourself quantifies  
6 lost profits?

7 A. Sure. It's pretty, it looks pretty simple. You just  
8 calculate AHG's lost sales and multiply that by AHG's  
9 profits. The kind of profits we use are incremental  
10 profits. And to get lost sales, you count up the accused  
11 units or the infringing ones and you multiply by AHG's  
12 prices.

13 Q. So does it make sense for us to start with the second  
14 of these equations, lost sales, because that's the first  
15 element in the lost profits calculation?

16 A. Sure.

17 Q. To determine lost sales, how did you determine? If  
18 we could just go back one slide for judgment a moment. The  
19 first thing you had to determine was the number of Broetje  
20 units sold; is that correct?

21 A. That's right. I had to count those up.

22 Q. And then if we can move to the next slide, how did  
23 you do that?

24 A. So we looked at Attachment 5, which was sort of the  
25 sum total of this, this work. Broetje provided a few sales

Ellis - direct

1 summaries. They also provided some invoices, purchase  
2 orders, packing slips, things like that, and we looked at  
3 all of those documents and found these sales and added them  
4 up.

5 Q. Why -- well, do you feel that the total number of  
6 sales that you relied on is 100 percent accurate in  
7 capturing all units Broetje has sold?

8 A. No. It's accurate in what I counted, but it's  
9 incomplete.

10 Q. And why do you say that it's incomplete?

11 A. There's several reasons. First of all, Broetje  
12 provided sales summaries, but those sales summaries were  
13 inconsistent with the underlying documents, and they  
14 provided multiple summaries and they were inconsistent with  
15 each other. Even the final summary has the wrong dates on  
16 it and wrong prices.

17 So when I see something wrong, I go back  
18 and I try to look at the underlying data and see if I can  
19 try to make some sense of it. So I started looking at  
20 invoices and packing slips and things like that, but all of  
21 those sets are incomplete, too. I don't have a full set of  
22 invoices or purchase orders, so I just counted up what I  
23 could.

24 Q. Do you have a sense of the magnitude by which the  
25 number of Broetje units is understated?

Ellis - direct

1 A. I don't. I do have one other data point, and that is  
2 we heard testimony earlier today that Broetje had, as of  
3 May 2011, they have 40 installations in the U.S., 10 or 11  
4 are AHG. Even looking at all of this data, we're still  
5 unable to account for eight.

6 Q. Let's go back to slide 94. So you've described to us  
7 how you calculate for purposes of calculating lost sales the  
8 number of Broetje units. That number is multiplied by AHG's  
9 prices; is that correct?

10 A. That's correct.

11 Q. Why do you use AHG's prices?

12 A. Because these are AHG's lost sales, or AHG's lost  
13 profits, so we're trying to look at what AHG would have made  
14 on those sales had it made the sale.

15 Q. What was your source for AHG's prices?

16 A. AHG provided me with average selling prices for the  
17 system components by year and I used those.

18 Q. How did you go about determining that that was a  
19 reliable calculation to rely on?

20 A. Yes. So I -- that's a summary document. So I  
21 basically, I took that and I compared that against the  
22 underlying documents I had, and it was matching up.

23 Q. So let's go to slide 98 and do the lost sales  
24 calculations so we can get that first component of the  
25 lost profits calculation. Can you walk us through this

Ellis - direct

1 slide 98?

2 A. Sure. This is just the result of multiplying those  
3 Broetje accused units by AHG's prices and that gives us lost  
4 sales of 5.575 million.

5 Q. All right. And then if we could go to slide 97 to go  
6 back to the equation that you told us about to calculate  
7 lost profits. What's the next component of that  
8 calculation?

9 A. So the next component is to take those lost sales and  
10 multiply them by the profit AHG would have made if it had  
11 made a sale. So to do that, I asked AHG to produce  
12 incremental cost information, which it did. I looked at the  
13 historical incremental cost that added up to be about -- and  
14 that's really the variable profit -- and that added up to be  
15 about 44 percent or so.

16 And then I looked at the lost sales and I said,  
17 well, if AHG had made these extra sales, what additional  
18 costs would they have incurred? And they probably would  
19 have had to hire another TC person, get more insurance, so  
20 the cost goes back up. I subtracted seven percent from the  
21 44 and I used 37 percent in this case.

22 Q. So as this trial approached, did you ever have an  
23 opportunity in connection with receiving updated data to  
24 test your 2011 calculation against the real world of profit  
25 margin?

Ellis - direct

1 A. Yes, I did. When I got new data and I analyzed it,  
2 you guys saw the chart, where the -- AHG sales just take  
3 off. Those are enough sales to capture the lost sales  
4 here.

5 So I could see what happened in the real world  
6 and how AHG's margin changed, and it did go down, like I  
7 predicted, but it only went to 40 percent. But I used a  
8 lower margin, a lower profit, 37.

9 Q. So what's the impact of using this lower margin of  
10 37 percent on your total calculation?

11 A. The number would be bigger if I used the 40 percent.

12 Q. So if we can go to slide 99, as we have. As a result  
13 of carrying out the lost profit equation, what is your  
14 conclusion about the amount of profits AHG lost because of  
15 Broetje's infringement?

16 A. The amount is --

17 Q. Of its patents?

18 A. The amount is \$2,099,943.

19 Q. How do you know that AHG would have made those sales  
20 if Broetje had not?

21 A. For a lot of reasons. The totality of the work I did  
22 all supports this, but we've heard that there are only two  
23 systems that work on AHG's, or Broetje's machines. It's  
24 AHG's patented system or Broetje's accused infringing  
25 system. If you are not selling the one, you're going to



Ellis - direct

1 sell the other.

2 Q. Focusing still on this slide 99, is your calculation  
3 of lost profits for patent infringement limited to the  
4 profit AHG lost to Broetje on the cassettes only?

5 A. No, it's not. I included other components of the  
6 system, so when AHG -- when looking at AHG's lost profits, I  
7 look at what AHG would have expected to make if Broetje had  
8 not infringed.

9 And so these things we've heard all day are  
10 sold. They are part of the system, they're called the  
11 system. The distribution racks, loading station exists  
12 because of the cassettes and they all work together, so I  
13 just included them all.

14 Q. So if we can turn to slide 100, is the inclusion of  
15 those component sales known by particular terminology in the  
16 world of patent infringement damages?

17 A. Yes. In my job, I would call the distribution rack  
18 loading stations convoyed or collateral sales. I would  
19 probably call the parts, the replacement parts that I  
20 include as derivative sales because they're sold later.

21 Q. And to be clear, your calculations also included the  
22 derivative sales?

23 A. That's right. The replacement parts.

24 Q. How did you determine that it was appropriate to  
25 include the distribution racks and loading stations as

Ellis - direct

1      convoyed sales in the lost profit calculation?

2      A.      I did an analysis. I looked at the functional links  
3      between the system components, the marketing links and the  
4      economic links.

5      Q.      And if we could just step through those relatively  
6      quickly, turning to slide 101, what did you conclude about  
7      the functional link between the system components?

8      A.      All of the documents and testimony I've heard  
9      supports that this is a single functional unit. The  
10     cassettes and loading stations and distribution racks are  
11     just made to go together. They're made to work together and  
12     are just one unit.

13     Q.      In addition to the functional link between the  
14     components, is there a marketing link between the system  
15     components?

16     A.      Yes. So for that, I looked to see what AHG and  
17     Broetje do in terms of how they hope to make sales. I look  
18     at the marketing literature and brochures and its sales.  
19     All of them have these three components of the system  
20     together. In fact, AHG calls theirs the consent delivery  
21     system, and Broetje calls theirs the automated fast and  
22     feed system. So they're both hoping to sell them all  
23     together.

24     Q.      In addition to the functional marketing link, is  
25     there also an economic link between the system components?

Ellis - direct

1       A.       Yes. So the economic link I look at, it's different  
2       than marketing because that's what they hope people buy, and  
3       then I look at what you people actually do, how do they vote  
4       with their dollars.

5               We heard earlier today that these things are  
6       sold together, so I wanted to check with the sales data I  
7       had to see if that's true. These pie charts you can see are  
8       generally, generally have the same proportions, and what  
9       that's showing me is whenever customers buy these products,  
10      they are buying them in the same proportions. They are  
11      buying them together. If I -- if customers didn't do that,  
12      you would see different proportions here.

13             And what I looked at was how Broetje purchased  
14      from AHG when the relationship was good. Then I looked at  
15      how AHG sold to customers. And then I looked at Broetje's  
16      selling patterns during the damages period, how it's selling  
17      now. And that confirms to me that everything sold in the  
18      same proportions and this is a single system in that way.  
19      There is an economic link.

20      Q.       So I think that we've completed the discussion of  
21      convoyed sales at least in the time that we have available.  
22      So let me move to another topic.

23             Is there any additional support for your  
24      conclusion that AHG should be awarded lost profits because  
25      of Broetje's infringement of AHG's patents?

Ellis - direct

1 A. Yes. I did some additional analysis as well.

2 Q. And can you describe for us -- and I would ask for  
3 slide 104 -- the additional analysis that you did?

4 A. Sure. I applied a four part test that is commonly  
5 used, that I commonly used to show lost profits. This is  
6 the Panduit test. It's based on a case, *Panduit v Stahlin*  
7 *Bros.* And the four factors that are commonly used are  
8 listed up there and I analyzed those.

9 Q. The first factor listed, the first Panduit factor  
10 listed on this slide is quantifying the "but for" lost  
11 profits. Have we covered that Panduit element?

12 A. Yes, we've gone through the calculations already.

13 Q. The next component listed is demand. And if we could  
14 have slide 105.

15 How do you know there is demand for AHG's  
16 patented technology?

17 A. This analysis is simple. You just look at sales.  
18 Your customers buy it. And here we have AHG cassette  
19 sales of \$5.5 million and Broetje's cassette sales of  
20 \$2.6 million.

21 This is a dual purpose slide, by the way. These  
22 numbers go through 2013. If you are going to take them  
23 through December 7th, 2009, the number would be \$5.4 million  
24 in total -- \$4 million for AHG and \$1.4 for Broetje as  
25 cassette sales.

Ellis - direct

1 Q. I see. So you are saying what the numbers would be  
2 if you stopped these in 2009?

3 A. That's right. But these sales numbers establish  
4 demand.

5 Q. So we've talked about quantifiable lost profits and  
6 demand. What about the next factor?

7 And I would ask for slide 106. No acceptable  
8 noninfringing substitutes.

9 What is that?

10 A. So this is another complicated way of saying what  
11 would customers have purchased if Broetje had not infringed?  
12 And we heard that AHG and Broetje are the only two  
13 technologies used on Broetje's machines. So if Broetje had  
14 not infringed and sold its accused products, they would have  
15 probably purchased -- they would have purchased from AHG  
16 just like they had for the ten years prior.

17 Q. Did you reach any conclusion as to whether in this  
18 case there were any acceptable noninfringing substitutes?

19 A. Yes, I reached a conclusion that there is not. And  
20 that is again based on testimony we've heard as well as the  
21 technical expert opinion of Dr. Kytomaa.

22 Q. And if we could move quickly. That is what your  
23 reference is, the testimony we just heard?

24 A. Yes.

25 Q. And to slides 108 and 109.

Ellis - direct

1 A. Yes. This just reiterates testimony we've heard  
2 today and additional testimony in Dr. Peters' deposition.

3 Q. And if we could have slide 110.

4 A. Yes. And that is just my conclusion. There is no  
5 acceptable noninfringing substitutes to AHG's patented  
6 technology.

7 Q. And there is one more Panduit factor that we have not  
8 yet discussed. The last of the four is manufacturing and  
9 marketing capacities; is that right?

10 A. Yes.

11 Q. Have you reached a conclusion with respect to AHG's  
12 manufacturing and market capacity to make the sales that  
13 Broetje made by infringing?

14 A. Yes, I have. My conclusion is that AHG had the  
15 manufacturing and marketing capability or capacity to handle  
16 those lost sales.

17 From the manufacturing side, I looked at AHG's  
18 ability to ramp up and make the extra sales. As we have  
19 seen in that chart, with the sales ramping up, we know AHG  
20 can make those levels of sales. They have a flexibility  
21 manufacturing process that utilizes outside suppliers in the  
22 United States.

23 Q. So very quickly with slide 112. Have we now covered  
24 your conclusions with respect to the four Panduit factors?

25 A. Just about. Can we go back to the last slide quickly?

Ellis - direct

1           From the marketing side, AHG's deal with Broetje  
2   with market, we saw that. But also there is a limited  
3   number of customers in this industry. We hear the same  
4   names over and over. And AHG markets. In fact, their  
5   product is now the standard in the industry and so people  
6   just request it. And that is called pole marketing.

7   Q.     I'm sorry, I cut you off on that answer. I didn't  
8   mean to.

9           So if we now completed your analysis of lost  
10   profits for patent infringement, can we turn then to the  
11   second?

12           THE COURT: Let me stop you there first. Do you  
13   think you will need more than five minutes to do that?

14           MS. SHARP: It's very close, Your Honor.

15           THE COURT: Well, we'll leave it for tomorrow.  
16   That's fine.

17           Ladies and gentlemen, we'll let you go about  
18   five minutes early today. Thank you for your attention  
19   today. Tomorrow will be very similar I think to today.  
20   We'll order lunch for you, if you get here in time to do  
21   that, and we'll try to begin close to 9:00 o'clock.

22           Of course, no talking about the case, no  
23   research, no reading about anything related to the case.  
24   And have a good evening. See you tomorrow.

25           A JUROR: You, too.

1 THE COURT: You may step down, Mr. Ellis.

2 You may have a seat or leave. I'm going to give  
3 you my rulings on the objections. I need somebody to stay  
4 to listen to me for that.

5 All right. So first of all, everything that is  
6 listed as an objection in the letter that came in under  
7 Mr. Schoell's signature yesterday, last night, all the  
8 objections are overruled. And let me tell you briefly why.

9 First, we have AHG objections to testimony  
10 designated by Broetje from Mr. Auriol.

11 The first one relating to the misspelling of his  
12 name on a patent. That is overruled. I think that at least  
13 has some minimum probative value relating to at least the  
14 possibility of human error at the PTO.

15 The objections with respect to the designations  
16 at page 48, overruled. I believe it's proper inventor  
17 testimony.

18 The objections to pages 77, 78, overruled. The  
19 questions there were proper. They relate to potential  
20 design-around. Evidently, the jury is going to see the  
21 witness fighting the question and refusing to answer, all of  
22 which would go to evaluating his credibility.

23 Then we have AHG's objections to the testimony  
24 designated from Mr. Hage at page 49. That is overruled. The  
25 witness has knowledge of whether customers are sophisticated



1 and whether they would know who makes the products they buy.  
2 It's not an improper expression of lay opinion. I'm not even  
3 sure it's opinion. And,

4 Finally, we have Broetje's objections to AHG's  
5 counterdesignations with respect to Mr. Hage. Those are  
6 overruled as well. We believe that the counterdesignations  
7 offered by AHG were not untimely.

8 So that's the rulings on what was pending for  
9 us.

10 We're expecting the submission on the jury  
11 instructions and the verdict sheet in just a little bit.

12 MR. KELLEHER: It may have already happened,  
13 Your Honor.

14 MR. HIGGINS: Your Honor, it has been filed and  
15 presumably delivered also.

16 THE COURT: All right. Terrific. Thank you.

17 Is there anything else pressing at this time  
18 from plaintiffs?

19 MR. LINDVALL: No, Your Honor.

20 THE COURT: All right. From defendants?

21 MR. KELLEHER: No, Your Honor.

22 THE COURT: All right. We'll look for you  
23 tomorrow. We'll find time to argue those objections  
24 sometime tomorrow. I don't know at which point of the day  
25 it will be.

1 We will be in recess. Have a good night.

2 (Proceedings adjourn at 4:26 p.m.)

3

4 I hereby certify the foregoing is a true and accurate  
5 transcript from my stenographic notes in the proceeding.

6

7 /s/ Brian P. Gaffigan  
8 Official Court Reporter  
9 U.S. District Court

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